INDEX

	Page
Statement of Position	1
Opinion Below	2
Jurisdictional Statement	2
Statutes Involved	2
Counterstatement of the Case	3
A. Proceedings before the Federal Maritime Board	3
B. Proceedings in the Court of Appeals	13
Questions Presented in the Court of Appeals	17
Summary of Argument	18
Introduction	22
I. The Judgment of the Court of Appeals Should Be Affirmed	27
A. The Petitions do not present adequate grounds for granting the Writs	30
B. There is no public interest in favor of the exclusive patronage system	31
C. Petitioners could not prevail on the merits	34
II. The Court of Appeals Correctly Held that the Exclusive Patronage System Contravenes Section 14, Third of the Shipping Act	37
III. The Legislative History of the Act Offers No Support to the Petitioners	42
A. The initial Report of the Alexander Committee Offers No Support to Petitioners' Position	43
B. Congress intended to preserve independent competition and to prevent discrimination	47
C. The present type of exclusive patronage system was never before the Alexander Committee	49

Page

D. Subsequent legislative history after the initial Report of the Alexander Committee makes it clear that the exclusive patronage system is illegal 50

IV. The Decision of the Court of Appeals Is Not in Conflict With Any Prior Decision of This Court or of Any Other Court 52

V. The Exclusive Patronage System Is Fundamentally Unlawful For Various Reasons Other Than the Violation of Section 14, Third 59

A. The exclusive patronage system is unjustly discriminatory 60

B. The Board has no discretion ever to approve the system because it involves persons, as parties, who are not subject to the Shipping Act 66

C. The Board's interpretation of the statute would render Section 15 of the Shipping Act unconstitutional 67

Conclusion 69

Appendix A 1a

Appendix B 6a

Appendix C 15a

CITATIONS

Cases:

A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Company, 336 U.S. 941 (1949) 53

A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Company, 342 U.S. 950 (1952) 53, 59

Agreement Pertaining to Brokerage of Pacific Coast European Conference (Docket 767, decided December 2, 1955) 25

Baltimore National Bank v. State Tax Commission, 297 U.S. 209 23

Bond v. Hoyt, 13 Peters, 171-172 23

Page

Chicago, Ind. & L. Ry. Co. v. United States, 219 U.S. 486 (1911) 62
Columbia River Packers' Association v. Hinton, 34 F. Supp. 970 24
Contract Rates—North Atlantic Continental Freight Conference, 4 F.M.B. 355, (1954) 7
Eastern Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944) 63
Ederi Mining Co. v. Bluefields Fruit and S.S. Co., 1 U.S.S.B. 41 (1922) 34, 57
Equitable Life Association v. Clements, 140 U.S. 226 (1890) 23
Ex Parte 5, Contract Rate Investigation (1926) 50
Far East Conference v. United States, 342 U.S. 570 (1951) 26, 29, 53, 54, 59
Fashion Originators' Guild of America v. Federal Trade Comm., 312 U.S. 457, (1941) 67
F.M.B. et al v. Isbrandtsen Company, 345 U.S. 975 (1952) 54
Fourche Lumber Co. v. Bryant Lumber Co., 230 U.S. 316 (1913) 63
Frost v. Wenie, 157 U.S. 46 (1894) 23
Frost Trucking Co. v. Railroad Commission of California, 271 U.S. 583, (1925) 68
General Motors Acceptance Company v. United States, 286 U.S. 49, 61-62 (1931) 23
Georgia v. Pennsylvania Railroad Company, 324 U.S. 439 (1944) 24
Gibson v. Phillips Petroleum Co., 352 U.S. 874 (1956) 1, 27
Gulf Intercoastal Contract Rates, 1 U.S.S.B.B. 524 (1936) 56
Heisterson's Tobacco, 11 Wall. 88-92 23
I.C.C. v. Alabama Midland Ry., 168 U.S. 144 (1897) 63, 64
Interstate Commerce Commission v. B. & O. R. Co., 145 U.S. 263 (1892) 61
I.C.C. v. B. & O. Railroad, 225 U.S. 326 (1912) 63
I.C.C. v. Delaware, L. & W. Railroad, 220 U.S. 235 (1910) 62
Inter-Island Steam Nav. Co. v. Territory of Hawaii, 305 U.S. 306 (1938) 62

Page

Isbrandtsen Company v. United States, 81 F. Supp. 544 (S.D. N.Y., 1948) 53
Isbrandtsen Company Inc. v. United States, 96 F. Supp. 883, (S.D. N.Y., 1951), affirmed sub nom., A/S J. Ludwig Mowinckels Rederi, 342 U.S. 950, 72 S. Ct. 623 (1952) 5, 26, 29, 34, 54, 59
Isbrandtsen Company Inc. v. United States, 211 F. 2d 51 (C.A. D.C., 1954), cert. denied, sub nom., Japan-Atlantic & Gulf Freight Conference v. United States, 347 U.S. 990, 74 S. Ct. 852 (1954) 6, 25, 26, 28, 29, 53, 54, 67
Japan-Atlantic and Gulf Freight Conference, et al. v. United States, 347 U.S. 990 (1954) 6, 67
Japan-Atlantic and Gulf Freight Conference 4 F.M.B.—(December 14, 1955) 29
Louisville & Nashville Railroad Co. v. Mottley, 219 U.S. 467 (1911) 62
Manaka v. Monterey Sardine Industries, 41 F. Supp. 531 24
Menacho v. Ward, 27 Fed. 529, 533 (C.C. N.Y., 1886) 63
Messenger v. Pennsylvania Railroad Co., 7 Vroom (36 N.J.L.) 407, 410 (1873), aff'd 8 Vroom (47 N.J.L.) 531 (1874) 63
Pacific Westbound Conference v. Leval, 269 P. 2d 541 (1954) 26, 28
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) .. 67
Pasadas v. National City Bank, 296 U.S. 497, 503-505 23
Prince Line v. American Paper Exports, Inc., 55 F. 2d 1053 (1932) 62
Rice v. Sioux City Cemetery, 349 U.S. 70, 73, 77 (1954) 30
River Plate and Brazil Conference v. Pressed Steel Car Company, 124 F. Supp. 88 (S.D. N.Y., 1954), 222 F. 2d 369 (1955) 26, 28
Rogers v. Missouri Pac. R. Co., U.S. Sup. Ct. Feb. 25, 1957 33
Schechter Corporation v. United States, 295 U.S. 495 (1935) 67
Seaboard Air Line Ry. Co. v. United States, 254 U.S. 57 (1920) 63
Standard Oil of Cal. v. United States, 337 U.S. 293, 306 (1949) 64

Page

Swayne and Hoyt, Ltd., v. United States, 300 U.S. 297 (1937) 16, 36, 39, 43, 55, 56
Swayne & Hoyt v. United States, 18 F. Supp. 25, 26 (D.D.C. 1936) 57
Sword Line v. United States, 351 U.S. 976 (1956) 1, 27
Texas & Pac. R. Co. v. Interstate Commerce Commission, 162 U.S. 197, (1895) 61
Texas and Pacific Ry. Co. v. United States, 289 U.S. 627 (1933) 63, 64
Thomsen v. Cayser, 243 U.S. 66 (1917) 65, 67
Trans-Pacific Freight Conference of Japan, 4 F.M.B.—(December 19, 1955) 29
United States v. Barnes, 222 U.S. 513 (1911) 23
United States v. Borden Co., 308 U.S. 188 (1939) 23
United States v. Butler, 297 U.S. 1, 71 (1936) 68
United States v. Illinois Central R. Co., 263 U.S. 515 (1924) 62
United States v. Southern Pacific Company, 259 U.S. 214 24
United States v. Tynen, 11 Wall. 88 23
United States Alkali Export Association v. United States, 325 U.S. 196 (1944) 23
U. S. Navigation Co. v. Cunard S. S. Co., 284 U.S. 474 (1931) 53, 55, 59, 62
Wight v. United States, 167 U.S. 512 (1897) 62

STATUTES:

Capper-Volstead Act, 17 U.S.C. §§ 291-292 23
Clayton Act, 15 U.S.C., §§ 12-27 53
Constitution of the United States: Article I, Section 1, Article I, Section 8, par. 18; and Amendment V 2, 17, 22, 23, 56, 67, 68, 69
English Ry. and Canal Traffic Act, 1854 61
English Ry. Clauses Consolidation Act, 1845 61
Fisherman's Collective Marketing Act, 15 U.S.C. § 522 24
Interstate Commerce Act, 49 U.S.C. § 1 et seq. 24, 33, 61, 62, 63
Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1151, et seq. 32, 33
Review of Orders of Federal Agencies Act of Dec. 29, 1950 (Hobbs Act)
Sec. 7 (5 U.S.C. § 1037) 15
Sec. 10 (5 U.S.C. § 1040) 1, 2

Page

Revision of Title 28, Judiciary and Judicial Procedure, 28 U.S.C. § 1254(1) 1
Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2 ....2, 23, 55, 58, 60, 66, 67, 68
Shipping Act, 1916, as amended, 46 U.S.C. §§ 801 et seq. 2, 6, 7, 8, 13, 16-21, 33, 34, 35, 37, 38, 39, 40, 43, 48, 49, 58, 60, 61, 65, 66, 67, 68, 69
Transportation Act, 49 U.S.C. §§ 71-78 24
Webb-Pomerene Act, 15 U.S.C. §§ 61, etc. 23

MISCELLANEOUS:

General Order 76 of Federal Maritime Board, 17 F.R. 10175, 46 C.F.R. 2363 5
Hearings, before House Merchant Marine and Fisheries Committee (February 7, 1957) 21, 35, 36, 52
H. R. Document 805, 63rd Cong., 2d Sess. (1914) (Alexander Committee Report) 37, 42-50, 51, 57, 61
H. R. 3728, 63rd Cong. 50
H. R. 18518, 63rd Cong. 50
H. R. 450, 64th Cong. 50
H. R. 10500, 64th Cong. 50
H. R. 14337, 64th Cong 51, 61
H. R. 15455, 64th Cong. 51, 61
H. R. 15565, 64th Cong. 51
Letter of Japanese Ministry of Transportation 19
Marx: *International Shipping Cartels* (1953) 57, 61
Royal Commission of Great Britain on Shippings Rings 32
Rules of the Supreme Court of the United States, Rules 19, 20, 28 U.S.C.A. 30, 31
53 Cong. Rec. 8074 50
53 Cong. Rec. 8095 44
53 Cong. Rec. 8105 51
53 Cong. Rec. 12449 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 739

FEDERAL MARITIME BOARD, *Petitioner*,

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE, *Respondents*.

No. 740

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC. and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, *Respondents*.

BRIEF OF RESPONDENT ISBRANDTSEN COMPANY IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND REQUESTING THAT THE JUDGMENT OF THE COURT OF APPEALS BE AFFIRMED.

STATEMENT OF POSITION

This Brief of Isbrandtsen is not necessarily opposed to the momentary granting of the Conference Petition for the sole purpose of affirming the Judgment of the Court below. See *Sword Line* v. *United States*, 351 U. S. 976 (1956); *Gibson* v. *Phillips Petroleum Co.*, 352 U. S. 874. Although there have been no substantial reasons stated for the granting of either Petition, Isbrandtsen is primarily interested that there be a final and conclusive ruling by this

Court on the illegality of the so-called exclusive-patronage system, in order to terminate once and for all litigation that has persisted for approximately ten years. Petitioners have presented no sound basis for attacking the decision of the Court of Appeals, which decision is thoroughly dispositive of each of Petitioners' present arguments. The purpose of this Brief is to show that Petitioners have no chance of succeeding on the merits, and that this Court should not be compelled to grant a full-scale Review, but that jurisdiction should be obtained only long enough to affirm the Judgment of the Court below, without any further argument or proceedings.

OPINION BELOW.

Petitioners, the Federal Maritime Board and the Japan-Atlantic and Gulf Freight Conference have applied for writs of certiorari to review a Judgment of the United States Court of Appeals for the District of Columbia Circuit. The Opinions below are set forth in the Appendix to each Petition.

JURISDICTIONAL STATEMENT.

The Judgment of the Court of Appeals was entered on November 9, 1956 (R. 251). Both Petitions for Certiorari were filed on February 1, 1957.[1] The jurisdiction of this Court has been invoked under 28 U. S. C. sec. 1254 (1) and 5 U. S. C. sec. 1040.

STATUTES INVOLVED.

The statutes and sections of the Constitution involved are the Shipping Act, 1916, as amended, 46 U. S. C. *sec. 801 et seq.*, the Constitution of the United States, Article 1, sec. 1, Article 1, sec. 8, par. 18, and Amendment V, and the Sherman Anti-Trust Act, 15 U. S. C. secs. 1, 2. The applicable statutes and sections of the Constitution are set forth in Appendix A to this brief.

[1] This Brief by Respondent Isbrandtsen Company, Inc. is addressed to the Petitions for Certiorari in both No. 739 and No. 740.

COUNTERSTATEMENT OF THE CASE.

A. PROCEEDINGS BEFORE THE FEDERAL MARITIME BOARD

The "Statement[s] of the Case" as set forth in the Petitions herein are so one-sided and incomplete that Isbrandtsen feels compelled to make its counterstatement in more detail than it would desire.

The conference practice under review, which the Court of Appeals has by its decision below condemned as illegal, is the so-called exclusive patronage contract non-contract dual rate system (hereinafter sometimes referred to as the exclusive-patronage system) under which common-carrier members of a steamship conference, acting in concert, charge one set of rates to shippers who agree to ship all of their cargo exclusively on the vessels of the Conference lines, and to charge a higher set of rates for identical transportation services to shippers who do not enter into such exclusive-patronage contracts, the admitted and avowed purpose of said system being the elimination of the competition of independent, non-conference carriers and the monopolization of the trade for Conference lines.

For purposes of presenting the issues of law in the simplest form, Isbrandtsen proposed a stipulation to limit the facts to those "existing in the administrative record as found by the Board itself" (R. 229-234),[2] even though the Board's decision was in favor of the use of the System by the Conference and even though Isbrandtsen had contested the validity of several of the facts so found by the Board. Isbrandtsen admitted the findings of fact in the Board's Report, *arguendo*, for purposes of presenting the fundamental legal issues. The essential characteristics of the exclusive patronage system—upon which the Court of Appeals based its decision of fundamental illegality—stand conceded by the Board's Report.

---

[2] References herein are to the appropriate pages of the Transcript of Record as filed with this Court. All emphasis in quotations has been supplied.

Respondent, Isbrandtsen Company Inc., is an American-flag carrier by water engaged in transporting cargo, as a part of its Eastbound Round-the-World Service, from Japan, Korea, and Okinawa to ports on the Atlantic Coast of the United States. Isbrandtsen, by its own choosing, has maintained a policy of not entering into agreements with other carriers concerning the fixing or regulating of transportation rates or fares or concerning the controlling, regulating, preventing, or destroying of competition. It is the only non-conference line operating in this particular trade, and has been since the end of the Second World War (R. 25).

In the freight service from Japan, Korea and Okinawa to the Atlantic Coast of the United States, Isbrandtsen competes for cargo directly with Petitioner, the Japan-Atlantic and Gulf Freight Conference (hereinafter "the Conference"), a private association of seventeen common-carrier steamship lines, having its principal office in Japan. The Conference is composed of twelve foreign-flag lines (eight of which are Japanese) and five United States-flag lines (R. 23). Although, nominally, there are five United States-flag members of the Conference, two are virtually inactive in the trade having carried practically no cargo from Japan, Korea or Okinawa to United States Gulf or Atlantic Coast ports since 1949 (R. 26).

Insofar as they are active in the trade, each Conference line operates as a common carrier by water. Because the vessels of each member line of the Conference regularly call at United States ports for the discharging of cargo, the Conference lines are subject to the jurisdiction of the laws of the United States (R. 25).

The admitted and avowed purpose of the Conference is to minimize and to eliminate competition through "the establishment, regulation, and maintenance of agreed rates and charges" (R. 139); and by the use of other devices including the exclusive-patronage system (R. 203).

The Conference and member lines thereof purport to act in concert and to operate pursuant to a conference agreement, FMB No. 3163, first approved by a predecessor agency of the Federal Maritime Board in 1934 (R. 24). This basic agreement permits the establishment and fixing of uniform rates as between conference lines, but it has never contained language authorizing, or purporting to authorize, the use of the exclusive-patronage system (R. 24). Notwithstanding this lack of approval by the Board, the Conference employed the system illegally from 1928 to 1941 and was thereby able to eliminate or suppress any *independent* or non-conference competition (R. 25).[3]

The present action stems originally from a filing by the Conference on December 24, 1952 under Rule 236.3 of the Board's *General Order 76*, 46 C. F. R. 236.3,[4] whereby the Conference proposed to employ, beginning the 30th day following the filing, the exclusive-patronage system in the Conference trade. Protests against the use of the system were timely filed by the United States Department of

[3] The Board's Report finds that "the pre-war differentials between contract and non-contract rates ranged from 12% to 66⅔% of the contract rates" (R. 25). Incredibly, the Conference gloats over this period of illegal monopolistic activities, saying that Prior to World War II, [the Conference] had employed a dual-rate system and thereby *brought about* stability of rates": (Conf. Pet., p. 4). Where there was no non-conference competition, as during this period, naturally every shipper was compelled to sign exclusive-patronage contracts in order to obtain the lower contract rates. The "non-contract rates" were, therefore, merely paper rates.

[4] After the decision of the Statutory District Court in *Isbrandtsen Company, Inc.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951) aff'd 342 U. S. 950 (1952), holding that a differential between contract and non-contract rates which was arbitrarily adopted was necessarily unjustly discriminatory, the Board promulgated General Order 76, 17 F. R. 10175, C. F. R. 236 (Nov. 10, 1952), requiring in substance that Conferences using or seeking to use the system state the basis of the spread and the reasons for the use of the system in the particular trade. Such a filing has never been considered to constitute the filing of an agreement for approval of the use of the system.

Justice and by Isbrandtsen, and a hearing was requested to be held before the issuance of any order that the system could go into effect (R. 20). The Board by its Order of January 21, 1953 refused to stay the institution of the system and granted a hearing on the protests only *after* the system would have become effective (R. 21, 214). Isbrandtsen filed a Petition for Review of the Board's Order in the Court of Appeals for the District of Columbia Circuit on January 22, 1953, and the Court granted on the same day Isbrandtsen's application for a temporary stay of said Order (R. 21). On March 23, 1953, the Court of Appeals granted an interlocutory injunction against that part of the Board's Order of January 21 which purported to approve the institution of the exclusive patronage system. *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (1954). Petitions for Certiorari filed by the Conference and the Board were denied by this Court. *Japan Atlantic and Gulf Freight Conference, et al.* v. *United States*, 347 U. S. 990 (1954).

At the hearings before the Board's Examiner, during the period between October 5 through December 23, 1953, the United States Departments of Justice and Agriculture and Isbrandtsen appeared in opposition to the proposed system. The original Recommended Decision of the Examiner was dated September 13, 1954 (R. 22). On motion of Isbrandtsen, the Department of Justice and the Board's Public Counsel, the proceeding was remanded to the Examiner by the Board's Order dated October 6, 1954, "with instructions to prepare supplemental findings of fact as to the basis of the spread between contract and non-contract rates and as to the reasonableness of the exclusive patronage contracts proposed for use in the trade, and with instructions to show the ruling upon the findings of fact and conclusions of law proposed by the parties" (R. 22).[5]

[5] The Original Recommended Decision of the Examiner comprised less than 23 pages, and contained not a single reference or single ruling upon the 413 Proposed Findings of Fact or 43 Conclu

Contrary to the specific provisions of Sections 14, 15, 16 and 17 of the *Shipping Act, 1916*, as amended, 46 U. S. C. 812, 814, 815, 816, prohibiting, among other things, "deferred rebates", retaliatory, discriminatory, prejudicial or unfair practices and other practices detrimental to the Commerce of the United States, the Board's Report, served December 14, 1955, purported to authorize the institution of an exclusive patronage system by the Conference, effective January 1, 1956, whereunder the Conference would maintain two levels of rates, *viz.*, the "contract rates" and the higher "non-contract rates", the sole consideration for the enjoyment by a shipper of the lower contract rates being the agreement of the shipper to patronize the Conference lines exclusively, and the sole reason for the exaction of the higher non-contract rates being the refusal of the non-contract shippers to sign exclusive-patronage contracts with the Conference.

In adopting the 9½ per cent differential between contract and non-contract rates, the Conference had no cargo statistics or surveys which it considered (R. 33). The non-contract rates would have been arbitrarily fixed at a level 9½ per cent higher than the contract rates (R. 20). Although the Conference had not determined what rates it would establish under the exclusive-patronage system, and, therefore, the Board had no specific rates before it, in approving the system, both the contract rates and the non-

---

sions submitted by the Parties. In his Supplemental Findings, in response to the Board's direction to state the basis for the 9½ per cent differential between contract and non-contract rates, the Examiner categorically answered that, "No basis for the spread or differential exists beyond the declarations of the Conference or its officers." The Board had previously in *Contract Rates-North Atlantic Continental Freight Conference*, 4 F. M. B. 355, 371 (1954) stated that:

> "Of course, the validity of the differential between contract and non-contract rates cannot depend upon the mere declarations of its proponents. . . ."

contract rates were to be charged for precisely the same transportation service and all incidents of carriage, there being no difference in cost or value, or in any other respect, between the service offered contract shippers and that offered non-contract shippers for identical cargo movements (R. 35).[6]

In order further to coerce the shippers and to effectuate a complete and permanent monopoly in the trade, the exclusive-patronage contract, as "approved" by the Board, provided that in the event a contract shipper should patronize a non-conference vessel operating in the trade, the shipper would become liable to a penalty of 50 per cent of the freight which he would have paid at conference contract rates had the shipment moved on a conference line (R. 36).[7] The exclusive-patronage contract, moreover, would be entered into for an indefinite period of time—forever! (R. 35). This "fire system" is intended to crush and eliminate the independent competition of Isbrandtsen, thereby allowing the Conference to enjoy a complete and perpetual monopoly in the trade and to charge such rates as the conference lines may wish.

The economic coercion of the Conference is further aided by the fact that the conference lines collectively furnish

[6] The Board expressly found that:

> "There would, under the dual rate system, be no difference in cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes of each might be identical and identically destined." (R. 35).

[7] It is important to note that whereas conference agreements authorized by Section 15 of the Shipping Act, 46 U. S. C. sec. 814, may contemplate elimination of competition *only among* member lines of the particular Conference, the principal purpose of the exclusive-patronage system is to eliminate and perpetually to suppress *non-conference or independent* carriers. This predatory purpose has been frankly admitted by the Board on various occasions. See Appendix C, *infra*.

over 300 sailings a year as compared with only 26 sailings yearly (approximately fortnightly) by Isbrandtsen (R. 27). Many shippers in the trade require more than two sailings each month (R. 35). Various Conference lines also furnish certain special facilities, such as refrigerated space and silk rooms, which Isbrandtsen does not provide (R. 35). Furthermore, Isbrandtsen does not serve certain ports, such as Gulf ports, which the Conference lines serve (R. 35). Shippers who would have to rely on Conference vessels for part of their service would be economically coerced into signing exclusive-patronage contracts with the Conference and would be prevented from patronizing or using the service of Isbrandtsen (R. 35).[8]

The Board specifically found that most of the Conference vessels commence loading inbound cargo for the United States at the Philippines, proceed then to Hong Kong and complete loading in Japan, and that they discharge such cargo at Pacific, Gulf and Atlantic ports of the United States (R. 25). The principal inbound cargo of Isbrandtsen has been loaded at Japan and the Philippines (R. 26). From 1950 to the present, Isbrandtsen has offered an approximately fortnightly service from Japan and the Philippines to Pacific and Atlantic Coast ports of the United States (R. 27). The Conference lines collectively during the year 1953 offered approximately 300 sailings from

[8] The Board in its Report admits the tremendous economic coercion which would be enjoyed by the Conference (R. 35):

> "Isbrandtsen's carryings, if a dual rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would practically *have no choice* between the Conference and Isbrandtsen's service as presently constituted."

Japan and approximately 250 sailings from the Philippines (R. 27).[9]

The sailings and percentage carryings of the Conference in the trade from Japan have increased substantially each year since 1950 without the use of the exclusive-patronage system (R. 27). The Petitions of both the Board and the Conference emphasize the relative participation between Conference vessels and the vessels of Isbrandtsen in the carriage of Japanese cargo, giving the implication that Isbrandtsen was carrying large percentages of this cargo movement in comparison with the Conference members. (Bd. Pet. p. 6; Conf. Pet. p. 5). The conclusion proffered by the Board and the Conference is most patently illusory. The trade from the Philippines and Japan to the Gulf and Atlantic Coasts of the United States is actually one trade participated in by all carriers, as the Board's Report finds (R. 25, 26). Isbrandtsen has been virtually excluded from Philippine cargo by use of the exclusive-patronage system in that trade.

When the overall trade from the Philippines, Hong Kong, and Japan is considered, the Conference lines have carried more cargo on each average sailing than Isbrandtsen. For example, taking the last full year of record, 1952—long before the Conference started the Rate War—each Conference vessel carried an average of 4700 tons per sailing from the Philippines as against only 1007 tons carried by Isbrandtsen (R. 27). In addition, the Conference loaded cargo at Hong Kong, from which port Isbrandtsen carried no cargo (R. 27). Thus, the Conference vessels loaded substantial inbound cargoes, before ever calling at Japan, in trades where Isbrandtsen is virtually excluded from participation because of the use of the exclusive-

[9] Conference sailings for the full year 1953 are estimated on the basis of figures in the record for the first six months of that year. During the first six months of 1953, the Conference had 153 sailings from Japan and 127 sailings from the Philippines.

patronage-contract system. The figures show conclusively that there has been *no* gradual encroachment by Isbrandtsen in the carryings of the Conference—*the situation has been, in fact, the reverse.*

The trade from Japan to the North Atlantic is presently overtonnaged (R. 27). This overtonnaging problem was made serious by the re-entry of Japanese lines into the trade, which lines carried only 15 per cent of the total cargo in 1951, but 66 per cent of the total movement in the first six months of 1953 (R. 28).[10] United States-flag participation, *including that of Isbrandtsen,* fell from 53 per cent in 1950 to only 21 per cent in the first six months of 1953 (R. 28).

As stated above, Isbrandtsen has chosen not to join steamship conferences having for their purpose the fixing of rates between member lines and the elimination of competition. It has considered that it had the right to be free from such entangling alliances with other carriers, who as a normal business practice should be its competitors. Neither the Board nor the Conference seem willing to recognize the right of such free enterprise, and imply that certain insidious motives are to be attributed to any carrier who would not join the Conference (Bd. Pet. p. 5; Conf. Pet. p. 5).

The reasons for Isbrandtsen's refusal to join the Conference and to relinquish its business independence to the concert composed of predominantly foreign-flag carriers are readily apparent. The Conference carriers themselves have not maintained the rates they have agreed upon, and an American-flag carrier, such as Isbrandtsen, who would choose to abide by any agreements it may enter, would in many instances be charging the highest rates in the trade. The evidences of this illegal Conference activity are set forth in the Board's Report. For example, during October

[10] The Board found that there "is a tendency on the part of Japanese shippers to favor Japanese lines, . . ." (R. 29).

1952, the Conference discussed "strong rumors and indications that some member lines were not adhering to tariff rates and regulations" and formally brought the matter to the Japanese Ministry of Transportation (R. 28). The Japanese Ministry of Transportation issued a warning to each Conference line against these malpractices and the secret rebating (R. 28).

Conference rates, except for the secret and illegal rebating above referred to, and the rates of Isbrandtsen remained stable and constant for relatively long periods of time prior to the rate war started by the Conference in March 1953 (R. 29). Shippers testified as to the lack of success, prior to the rate war, "in their efforts to convince the Conference to reduce the level of rates on various commodities" (R. 30).

In March 1953, the Conference rejected a proposal of a member line to meet Isbrandtsen's competition by lowering its tariff rates (R. 30). The Conference instead voted on March 12, 1953 (after the Court of Appeals had granted the Stay referred to above, against the use of the system) to "open" rates on ten of the major commodities in the trade (R. 30). The Conference subsequently opened rates on most commodities which move in substantial volume in the trade (R. 30). The Board found that the decision to start the rate war was directed at non-conference competition and also *at the secret "rebating" by Conference lines* (R. 31). It is frankly stated by the Board that the Conference, in starting the rate war,

> "hoped that the rate war would lead to Isbrandtsen's joining the conference or to the institution of the dual rate system or other system" [either of which occurences would have given the Conference an absolute monopoly]. (R. 31)

Immediately after the outbreak of the rate war, rates fell to less than out-of-pocket handling costs (R. 31). In May 1953, Isbrandtsen instituted minimum compensatory

rates below which it would not go to secure cargo (R. 34). Isbrandtsen gave public notice in the trade of its desire to apply reasonable rates, which practice the conference lines refused to adopt (R. 31).

The rate war instituted by the Conference was extremely detrimental to the commerce of the United States, and many shippers requested the Conference to end its deleterious practice (R. 32).

The exclusive-patronage system is basically a device conceived for the precise purpose of evading the specific proscriptions of the Shipping Act of 1916. It has no place in the promotion of the foreign commerce of the United States, and it is not consonant with the interests of the shipping public. The pious plea that it is needed to promote "stability of rates"—a plea presented throughout the Petitions of the Board and the Conference—constitutes the most meaningless verbalization. The exclusive-patronage system will neither increase cargo movements in United States foreign commerce, nor will the lack of the system stifle any movement. As a matter of fact, as the Conference Petition admits (Conf. Pet., p. 8), during recent months in the Conference trade, the cargo movement has been extraordinarily heavy and rates have been maintained at remunerative levels—all without use of the assailed system.

B. PROCEEDINGS IN THE COURT OF APPEALS.

The Board's Report, approving the institution of the exclusive-patronage system as of January 1, 1956, was not served upon the public until Friday, December 14, 1955 (R. 19). This Report at the time of service was not accompanied by an Order as is usual in administrative adjudicatory decisions. Because of the shortness of time before the system would have become effective (a large part of which was the intervening Holiday season), and because the Report did not even specify whether the system would become effective as of Tokyo time or Washington, D. C. time (the

former being one and one-half days earlier), Isbrandtsen was compelled to file its Petition to Review promptly with the Court of Appeals, asking for a temporary stay of the Board's Report (R. 2).

On the day of the filing of the Petition to Review, December 19, 1955, Isbrandtsen's attorney delivered a letter to the Board, calling the Board's attention to the filing of its Petition, which was also delivered, and to various formal deficiencies in the Board's Report, including the lack of an accompanying Order (R. 85).

The Board, on December 21, 1955 (seven days after service of its Report), served its First Order in the administrative proceeding, specifying, *inter alia*, that the system was approved "effective January 1, 1956, at 12:00 noon Eastern Standard Time" (R. 73). On January 11, 1956, the Board served its *Second* Order, eleven days after the system would have become effective according to the Board's original Report (R. 75).[11]

In the original Report, the Board stated that, "we disapprove the [exclusive-patronage] contract form insofar as it purports to cover F. O. B., or F. A. S. sales" (R. 65). The first Order of the Board reaffirmed the approval of the system effective January 1, 1956, "excepting that said contract system shall not apply to shipments which are made on an F. O. B., F. A. S., or ex godown bases or to the transportation of cargoes in refrigerated compartments" (R. 74).

The second Order of the Board, served on January 11, 1956, apparently attempted to accomplish a major and fundamental change in the exclusive-patronage contract, by stating that the system would not apply to F. O. B. or F. A. S. shipments "unless the person whether seller or buyer named as shipper in the ocean bill of lading is a

[11] Isbrandtsen's Petition to Review was amended so as to include review of the Board's Supplemental Orders.

contract signatory" (R. 76). The language of the second Order has remained a continuing mystery to Isbrandtsen, and there were no findings whatsoever, either in the Report or in the Supplemental Order, to support what was apparently a new conclusion. Isbrandtsen, therefore, filed a Motion with the Court of Appeals below to remand the second Order of the Board for a proper recitation of the circumstances and reasons prompting it and for proper findings of fact pursuant to the requirements of the Administrative Procedure Act (R. 77). The Court below finally declared this Motion to be moot, in view of its decision holding the system to be illegal.

The Petition to Review named the United States and the Federal Maritime Board as Respondents (R. 2). The United States, represented by the Attorney General, was the statutory Respondent under 5 U. S. C. sec. 1037. The Federal Maritime Board was added as a Respondent, pursuant to a Rule of the Court of Appeals. The Department of Justice joined Isbrandtsen in attacking the validity of the Board's Orders and the legality of the exclusive-patronage system. Thereafter, the Secretary of Agriculture, one of the largest shippers in the foreign commerce of the United States, intervened in support of Isbrandtsen's position, and the Japan-Atlantic and Gulf Freight Conference intervened as a Respondent-Intervenor in the support of the Orders of the Board. Oral argument was had before the Court on May 19, 1956.

The Judgment of the Court of Appeals was entered on November 9, 1956 (R. 251). In the opinion by Fahy, J., the Court unanimously held that the exclusive-patronage system was fundamentally unlawful and in violation of Section 14, Third of the Shipping Act of 1916. Specifically, the Court held that:

> "Since the dual-rate system here constitutes retaliation it must be condemned without regard to the question of reasonableness, as are deferred rebates" (R. 246); and

"We think it clear not only that the liquidated damage provision is discriminatory but that a 9½ per cent differential for exactly the same service and facilities is of like character." (R. 249)

Washington, J., "fully concur[red]" in Judge Fahy's opinion. He offered, however, certain additional observations, concurred in by the entire Court, among which were the following:

"In the first place, it seems clear that in actual practice the contract system is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so. Is this 'retaliation' proscribed by the Act? Certainly there seems no reason to limit 'retaliation' to the dictionary definitions of 'returning like for like' or 'evil for evil' which have been selected by the Board. The very example used by the statute, boycotting for use of another carrier, is not 'like for like' nor are the boycotting carrier or group of carriers necesarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results."

"Are these contracts, then, the sort of 'discriminating or unfair methods' that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne and Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303 (1937), a contract system under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is 'prima facie discriminatory' [footnote omitted]. Nevertheless, the Board urges that the literal meaning of the statute should not be followed." (R. 250, 251).

Because the Court below found that the exclusive patronage system was unlawful under Section 14, Third of the Shipping Act, it did not discuss the various other questions of illegality raised by the Petition to Review, which Is-

brandtsen considers to be equally as formidable objections to the system as the violation of Section 14, Third of the Shipping Act.

QUESTIONS PRESENTED TO THE COURT OF APPEALS.

1. Whether the employment of the so-called exclusive patronage contract/non-contract dual rate system, under which common-carrier members of a steamship conference acting in concert, charge one set of rates to shippers who agree to ship all their cargo exclusively on the vessels of the conference lines, and charge a higher set of rates for identical transportation services to shippers who do not enter into such exclusive patronage contracts is unlawful under, or in violation of sections 14, 15, 16, and/or 17 of the Shipping Act, 1916, so that the Federal Maritime Board under section 15 of said Act, lacks authority to approve an agreement, understanding or arrangement entered into by the members of such a conference for the use of such a system?

2. Whether such a system violates the various provisions of the Anti-Trust laws or any other pertinent statutes, including the question whether the system could ever be legally approved under section 15 of the Shipping Act, because that section can exempt from the Anti-Trust laws only agreements between carriers and "other persons" subject to the Act, whereas the fundamental part of this system is a so-called exclusive patronage contract between conference lines and shippers, who are neither carriers nor "other persons" subject to the Act.

3. Whether the Board could, in any event, approve the use of the exclusive-patronage-contract-dual-rate system in the particular trade herein involved on the basis of the facts existing in the administrative record as found by the Board itself?

4. Whether the Board, in approving such a system under section 15 of the Shipping Act even assuming the legality

of such a system, must have before it a clearly stated "agreement" or "understanding" between the common carriers involved, including the actual rates which would be charged by such conference carriers pursuant to their concerted action?

5. If section 15 of the Shipping Act, 1916, should authorize the Board to approve such a system, whether such section of the Act would thereby be rendered unconstitutional under the "Due Process" clause or other provisions of the Constitution by reason of the fact that it would give the Board and/or Conference the power to force the independent carrier or carriers either out of the trade or into the conference and/or permanently prevent independent competition from entering the trade by making non-conference competition economically impossible?

The Court of Appeals found it unnecessary to go beyond the issues in Question 1, in view of its holding that the system was fundamentally illegal under Section 14, Third of the Shipping Act. Even under this question the Court below did not decide the serious challenge of illegality under Sections 15, 16 and 17 of that Act. We stress to this Court the importance of those remaining issues under Question 1, as well as the importance of the issues raised in the succeeding questions, particularly questions 2 and 5.

SUMMARY OF ARGUMENT.

INTRODUCTION.

The controversy here concerns only the exclusive-patronage system and not the Conference system as such. The Court below has passed upon only the single issue of illegality under Section 14, Third of the Shipping Act. The system is subject to equally serious objections of illegality, however, even if it were able to pass muster the proscriptions of Section 14, Third; *viz.*, it would be unjustly discriminatory in violation of Sections 15, 16, and 17 of the

Shipping Act. Furthermore, the system could never be legally approved because it involves an agreement with shippers who are not "persons" subject to the Shipping Act, and who cannot consequently receive any immunity from the Anti-trust Laws. Should the Board's interpretation of the Act be held valid, Section 15 of the Act would be rendered unconstitutional. The facts on which the challenges of illegality are based are conceded by the Board's Report.

I

The most striking feature of the Petitions is the lack of any substantial reasons why the Writs sought should be granted. In the first place, there has been no proven public interest in favor of the system. Secondly, and more importantly, Petitioners have no chance of prevailing before this Court on the substantive merits. Although technically there are no real grounds for granting the Petitions, Isbrandtsen is primarily interested that this Court affirm the Judgment of the Court below, because of the proven reluctance of the Board to accept decisions of the lower Courts pertaining to this matter. The Court of Appeals has considered all of Petitioners' present arguments and has carefully analyzed and thoroughly disposed of each of the contentions now or heretofore raised in support of the system. Nothing remains to be said! Under these circumstances, this Court should not be compelled to hear further arguments, and the only review to be granted should be the momentary granting of the Conference Petition, for the sole and immediate purpose of affirming the Judgment of the Court of Appeals, without any further argument or proceedings.

II

The Court of Appeals correctly held that the system contravenes Section 14, Third of the Shipping Act, and

Petitioners have not even undertaken to dispute the real basis of the Court's reasoning. It is difficult to imagine a clearer case of retaliation or "resort to other discriminatory or unfair methods" against a shipper, "because such shipper has patronized [another] carrier", than the exclusive-patronage system.

III

The Legislative History of the Shipping Act offers no support to Petitioners. The Board and the Conference have traditionally relied upon a distortion of the preliminary Report of the Alexander Committee and have avoided any discussion of subsequent legislative history. It is important to recognize the status of the preliminary report of the Alexander Committee, because the portions relied upon by Petitioners are actually nothing more than a *summary of arguments*, which had been made to the Committee at the hearings, most of which were made by the Conferences themselves. The legislative history of the Act is precisely clear that Congress intended to preserve independent competition and to prevent discriminations by Conference lines against shippers. In this respect, it specifically prohibited all such exclusive-tying arrangements or unfair practices *then in use* by conferences—and the only reason that the present type of exclusive-patronage system was not condemned in *haec verba* was that *it was not then in use*. The exclusive-patronage system is in all material respects similar to the specifically outlawed exclusive-patronage-deferred-rebate system, which was then in use.

IV

The decision of the Court of Appeals herein is not in conflict with any prior decision of this Court or any other Court. It has generally been conceded, as it was by the Board's own Chairman in his recent testimony before the House Merchant Marine and Fisheries Committee, and it

is obvious from the cases, that until the decision of the Court below, there has been no definitive judicial decision on the legality or illegality of the exclusive-patronage system.

V

In addition to the basic and unavoidable illegality of the system under Section 14 of the Shipping Act, the system is fundamentally unlawful for various other reasons, which issues it was unnecessary for the Court below to meet, in view of its holding of illegality under Section 14. These additional obstacles which the system would have to overcome in order to be rendered legal are of substantial importance, and constitute further cogent reasons why Petitioners have no chance of succeeding before this Court on the merits, and why the Judgment of the Court below should be affirmed.

A. The system is necessarily and fatally illegal because it is unjustly discriminatory and unduly prejudicial in violation of sections 15, 16, and 17 of the Shipping Act, since it involves the charging of different rates to identically situated shippers for identical transportation services.

B. The Board has no discretion or jurisdiction to approve the system because it involves as its main and most essential ingredient an exclusive-patronage contract entered into between common carriers and shippers, the latter parties not being "persons" subject to the Shipping Act nor subject to any immunity which may be given by the Board, pursuant to Section 15 of the Act, from the Anti-trust Laws.

C. The Board's interpretation of the Act would render Section 15 of the Act unconstitutional as an unlawful delegation of legislative authority, and because it would deprive Isbrandtsen and other carriers—particularly "tramp" carriers—of property without due process of law. The Board's interpretation would confer upon the Conference, a private cartel, the absolute power to ex-

clude any independent carrier, whether a common or contract carrier, from the trade unless the independent joined the Conference. Contract carriers could never join, however, because they are not subject to the Shipping Act, and would have to become common carriers or retire from business. This would be the equivalent of giving the private monopoly the power to issue certificates of public convenience and necessity, with no statutory guide for their issuance.

ARGUMENT

The controversy here is the so-called exclusive-patronage system, not the Conference system as such. Isbrandtsen has raised no issue with respect to any particular rates set by the Conference so long as they apply equally and uniformly to all shippers without the invidious discriminations inherent in exclusive-patronage arrangements. Thus, the case does not involve a dispute concerning uniform conference rates established by the Conference pursuant to its rate-making authority under its basic conference agreement.[12]

The Court below has passed upon only the single issue of illegality under Section 14, Third of the Shipping Act. The exclusive-patronage system, however, is subject to equally serious objections of illegality even if it were able to pass muster the proscriptions of Section 14, Third. These other provisions of law which the system would violate are innumerable, but at least it would be unduly prejudicial and unjustly discriminatory in violation of Sections 15, 16, and 17 of the Shipping Act. Furthermore, the system could never be legally approved because the cornerstone of such system involves an agreement with persons who are not subject to the Shipping Act, and who conse-

[12] As previously pointed out, the evidence shows that the Conference lines have not adhered to their own Conference rates and regulations and have been guilty of illegal and secret rebating and other malpractices. This matter was the subject of a "warning" to each Conference line by the Japanese Ministry of Transportation (R. 28).

quently cannot receive any immunity from the Anti-trust Laws. Should the Board's interpretation of the Act be held valid, Section 15 would be rendered unconstitutional.

Certain Conference agreements may be permitted by Section 15 of the Shipping Act, but they can be approved by the Board *only insofar* as they are *not*

(1) unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, *or*

(2) detrimental to the commerce of the United States, *or*

(3) otherwise in violation of the Act.

Such lawful agreements, which are approved by the Board, are exempted from the Anti-trust Laws. The immunity so conferred from the Anti-trust Laws is strictly limited by the specific words of the statute.[13]

[13] Under familiar rules of statutory construction, it is established that the creation of a specific exemption in a statute negatives any implication that other and broader exemptions were intended by the legislature. *Bend* v. *Hoyt*, 13 Peters, 171-172; *Equitable Life Association* v. *Clements*, 140 U. S. 226. It is also a well established principle that courts do not favor repeals by implication. *United States* v. *Borden Co.*, 308 U. S. 188, *General Motors Company* v. *United States*, 286 U. S. 49, 61-62; *Henderson's Tobacco*, 11 Wall. 88-92; *Pasadas* v. *National City Bank*, 296 U. S. 497, 503-505. Immunity from the application of the Sherman Act cannot be implied by reference to general legislative policy or asserted inconsistencies with other statutes but must be expressly granted. *General Motors Co.* v. *United States*, *supra*; *Henderson's Tobacco*, *supra*; *United States* v. *Tynen*, 11 Wall. 88, 92; *Pasadas* v. *National City Bank*, *supra*; *United States* v. *Barnes*, 222 U. S. 513; *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209; *Frost* v. *Wenie*, 157 U. S. 46. The courts have uniformly applied such strict construction when considering statutory exemptions from the Sherman Act. The Capper-Volstead Act (17 U. S. C. A. secs. 291-292) was so construed in *United States* v. *Borden Co.*, *supra*, as was the Webb-Pomerene Act (40 Stat. 516, 15 U. S. C. §§ 61, 62, 65) in *United States Alkali Export Association* v. *United States*,

The astonishing nature of the departure from traditional standards of common-carrier rate-making, involved in the exclusive-patronage-contract system, is most vividly delineated by a mere summary of the salient and admitted features of the system:

(1) Two sets of rates—one of which is higher by an arbitrary differential of 9½ per cent—are charged by the *common carrier* conference lines for *precisely the same transportation service;*

(2) The sole consideration entitling a shipper to the lower "contract" rates is his agreement not to patronize —or to boycott—any non-Conference carrier;

(3) The discrimination in rates is entirely unrelated to volume or frequency of shipments—indeed, the contract shipper would undertake no obligation to ship any freight at all;

(4) The higher non-contract rates would be exacted from shippers solely because they would refuse to agree not to patronize any independent carrier;

(5) The contract shipper would be subject to severe retaliatory penalties for employing the service of an independent carrier, becoming liable for 50 per cent of the freight which he would have paid at Conference contract rates;

(6) The exclusive-patronage contract—*the key to the system*—would be entered into between the Conference lines and shippers for an indefinite period of time;

---

325 U. S. 196; the Transportation Act (41 Stat. 456, 590, 49 U. S. C. A. §§ 71-78) in *United States* v. *Southern Pacific Company*, 259 U. S. 214; the Fishermen's Collective Marketing Act (15 U. S. C. A. § 522) in *Columbia River Packers' Association* v. *Hinton*, 34 F. Supp. 970; and *Manaka* v. *Monterey Sardine Industries*, 41 F. Supp. 531; and the Interstate Commerce Act (54 Stat. 898, 49 U. S. C. A. § 1) and supplementary legislation in *Georgia* v. *Pennsylvania Railroad Company*, 324 U. S. 439.

(7) Because the Conference lines collectively offer a greater and more comprehensive service, many shippers would be coerced into signing exclusive-patronage contracts; and

(8) The intended and inevitable result of the exclusive-patronage-contract system would be to monopolize the trade in the hands of the carriers employing the system.

Since 1947, it has been the relentless efforts of the United States Departments of Justice and Agriculture and Isbrandtsen which have been primarily responsible for court decisions forcing the Board to go through at least some prefunctory—though unavailing—motions in the regulation of the shipping cartels. The Board has consistently disavowed the need for regulating these steamship monopolies and has even disclaimed its power to do so,[14] contend-

[14] Although the Board had previously argued to this Court in *Isbrandtsen Company* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. denied 347 U. S. 990 (1954), that it had "plenary power over all Conference activity," including the power to "disapprove, cancel or modify any agreement" in any manner as it might deem proper and the power to "direct the conference to suspend rates under sanction of cancellation of the basic agreement," the Board has since denied this power in *Agreement Pertaining to Brokerage of Pacific Coast European Conference* (Docket 767, decided December 2, 1955). In that case, the Board found that the Conference was operating under an unapproved modification of its basic agreement—one that the Board's Regulation Office had specifically rejected—and that the carriers had deliberately adopted the modified agreement on October 5, 1954 and applied it retroactively to September 29, 1954. Not only did the Board flatly disavow any power to stop this illegal conference activity, which it had represented it had to this Court and to the Supreme Court, in the previous appeal of the Board's action in this very *Japan-Atlantic and Gulf Freight Conference* case, but it *refused to submit the case to the Department of Justice for appropriate action.* The Board stated specifically that it considered itself "to be without authority, express or implied, to suspend or stay approved or unapproved agreements between carriers." In other words, once a conference basic agreement has been approved by the Board it is inviolable and immune from further regulation.

ing, from time to time, *inter alia:* that the exclusive-patronage-contract can go into effect without opportunity for an agency hearing or protests by interested parties; that the Board is without power to prevent a Conference from instituting such a system or to suspend the system for any reason once instituted; that an exclusive-patronage-contract system does not constitute an "agreement" or "understanding" within the meaning of Section 15 of the Shipping Act and does not require Board approval; and that the Board has exclusive jurisdiction to determine whether or not it has in fact approved an exclusive-patronage-contract system. It has required several Court decisions to dispel these fantasies of the Board. *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883 (S. D. N. Y., 1951), affirmed *sub nom. A/S J. Ludwig Mowinckels Rederi*, 342 U. S. 950 (1952); *Far East Conference* v. *United States*, 94 F. Supp. 900 (D. N. J., 1951), rev'd 342 U. S. 570 (1951); *Isbrandtsen Company* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. denied 347 U. S. 990 (1954); *Pacific Westbound Conference* v. *Leval*, 269 P. 2d 541 (1954); *River Plate and Brazil Conference* v. *Pressed Steel Car Company*, 124 F. Supp. 88 (S. D. N. Y., 1954), 222 F. 2d 369 (1955).

Despite the fact that the Board's procedure has been soundly criticized in both the first and second Isbrandtsen cases, and the exclusive-patronage contracts held unenforceable in *Pacific Westbound* v. *Leval*, *supra;* and *River Plate* v. *Pressed Steel Car*, *supra;* the Board's procedural deficiencies and obstructions have been responsible for so long avoiding any definitive decision on the claim of fundamental illegality.

I. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

For approximately ten years, Isbrandtsen has been seeking a final and definitive decision from the Courts on the illegality of the exclusive patronage system; the decision of the Court below is such a definitive decision.

The Board, as will be explained below, has shown considerable reluctance to accept the decisions of the lower Courts pertaining to this system. Although technically there are no real grounds for granting the Petitions, Isbrandtsen is primarily interested that this Court affirm the Judgment of the Court below—and without more.

The Court of Appeals, in its unanimous decision, has considered all of Petitioners' present arguments and has carefully analyzed and thoroughly disposed of each of the contentions now or heretofore raised in support of the system. Nothing remains to be said! Isbrandtsen believes that, under these circumstances, and because Petitioners have no likelihood of succeeding before this Court on the merits, irrespective of the length or nature of the review, the Judgment of the Court of Appeals holding the system illegal should be affirmed without granting any full-fledged or prolonged review, as envisioned by the Petitions.

The only review by this Court should be the momentary granting of the Petition of the Conference, for the immediate and sole purpose of affirming the Judgment of the Court of Appeals. See *Sword Line v. United States*, 351 U. S. 976 (1956), *Gibson v. Phillips Petroleum Co.*, 352 U. S. 874. In this respect, Isbrandtsen submits that the Petition of the Conference, the aggrieved party, be granted and not the Petition of the Board, which has sat as "Judge" on the original issues. Short of such momentary Review, both Petitions should be denied.

Isbrandtsen is fearful that anything less than affirmance of the Judgment below by this Court will not dissuade the

Board from attempting to pursue its stubbornly and long-held views in one or more other Circuits, thus involving interminable litigation that no private litigant could endure. The Board in the past has been quite reluctant to heed prior Court decisions involving the exclusive-patronage system. In *Isbrandtsen v. United States*, 211 F. 2d 51, cert. denied *sub nom., Japan-Atlantic and Gulf Freight Conference v. United States*, 347 U. S. 990 (1954), it was held that an exclusive-patronage system involved an "agreement between carriers" within the purview of Section 15 of the Shipping Act, and that any such agreement between carriers would require prior approval by the Board. The question of illegality of the system was never met, or indeed raised, in that case, but only the question of whether the exclusive-patronage system constituted an "agreement between carriers" under Section 15 of the Shipping Act.

Despite the clear holding in the *Japan-Atlantic* case, that prior approval of any exclusive-patronage system was necessary, in any event, the Board in the almost four-year interval has done nothing to implement the decision with respect to the sixty-two (62) other Conferences under its jurisdiction which presently use the exclusive-patronage system without any approval by the Board. The Courts, however, have not been encumbered with such hesitation, and have held the exclusive-patronage contracts unenforceable. *Pacific Westbound Conference v. Lexal*, 269 P. 2d, 541 (1954); *River Plate and Brazil Conference v. Pressed Steel Car Co.*, 124 F. Supp. 88 (S. D. N. Y. 1954).

As the Petitions admit (Bd. Pet., p. 12; Conf. Pet., p. 9), approximately 62, of the 125 Conferences subject to the Board's jurisdiction, use the exclusive-patronage system. Notwithstanding the decision of the Court of Appeals holding that these systems constituted agreements, certiorari having been denied by this Court, not one of these 62 Conferences, to Isbrandtsen's knowledge, has ever filed

for or obtained such formal Approval.[15] This strange inertia of the Board is more vividly illustrated in the correspondence between the Board and Counsel for Isbrandtsen, which has been attached hereto as APPENDIX B.

The entire position of the Federal Maritime Board in this proceeding is anomalous to say the least. From the outset of the legal attacks upon the exclusive-patronage system by the Departments of Justice and Agriculture, as well as by Isbrandtsen, the Board has been the most strenuous advocate of the Conference position. After the Board's vigorous defense of the legality of the system in several cases before the courts, *Isbrandtsen Company, Inc.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y., 1951), affirmed *sub nom., A/S J. Ludwig Mowinckels Rederi*, 342 U. S. 950, 72 S. Ct. 623 (1952); *Far East Conference* v. *United States*, 94 F. Supp. 900 (D. N. J., 1951) rev'd 342 U. S. 570, 72 S. Ct. 492 (1952); *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51 (C. A. D. C., 1954), cert. denied *sub nom., Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U. S. 990, 74 S. Ct. 852 (1954)—even though the basic issue of legality was never reached prior to the instant decision of the Court of Appeals—there was little likelihood that the Board could hold an impartial hearing on these issues. The situation was, in fact, one when an advocate was sitting as the judge in its own case.

---

[15] The Board's reluctance to follow the decisions of the Courts is not surprising, for it does not even follows its own decisions. It has repeatedly emphasized that the exclusive-patronage system could only be used where competitive conditions presented by non-conference carriers so warranted. *Japan-Atlantic and Gulf Freight Conference*, 4 F. M. B.—(December 14, 1955); *Trans-Pacific Freight Conference of Japan*, 4 F. M. B.—(December 19, 1955). The Affidavit of Lloyd Tribbott, Chief of the Board's Regulation Office, states that *in only ten of these 62 trades, where the exclusive patronage system is used, is there any independent competition whatsoever* (R. 133).

It is with full realization of this never-say-die attitude of the Board that Isbrandtsen presses for definitive action now by this Court. Isbrandtsen most sincerely desires an end to litigation that has lasted now for approximately a decade. It believes that the definitive action of this Court should be the *immediate affirmance of the Judgment below.*

A: The Petitions do not present adequate grounds for granting the writs.

The most striking feature of the Petitions of the Board and the Conference is the lack of any substantial reasons why the Writs sought should be granted. In the first place, there has been no proven public interest in favor of the exclusive-patronage system. Secondly, and more importantly, the Petitioners have no chance of prevailing before this Court on the substantive merits.

Petitioners have not succeeded in bringing themselves within Rule 19 of this Court. They have not submitted in their Petitions and "special and important reasons" (Rule 19, 1) for the exercise by this Court of its "sound and judicial discretion" for granting such Writs. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 73, 77 (1954). Nor do Petitioners present any case within any of the "character of reasons" (Rule 19, 1) for which such Writs are granted.

Petitioners similarly have not succeeded in stating any "important question of federal law which has not been, but should be settled by this Court." (Rule 19 b). The direct holding of the Court of Appeals is carefully analyzed and is thoroughly dispositive of all of Petitioners' arguments. Certainly this Court should not be compelled to hear prolonged or lengthy arguments on this case, where Petitioners have no likelihood of success on the merits.

Even if "public importance" by itself could be a proper ground for the granting of the Petitions, after the case has

been thoroughly explored and decided by the Court below, Petitioners have not exhibited any public importance in support of the exclusive-patronage system. Thus, if Petitioners had been applying for the instant Writs under Rule 20 of the Rules of this Court—which they are not—covering "a case pending in a Court of Appeals *before* judgment", no case of "imperative public importance" has been made out. Of the 125 Conferences under the Board's jurisdiction less than half use the exclusive-patronage system, and only 10 of these Conferences have any independent competition whatsoever. In addition, in this very Conference trade, cargo is now moving in unprecedented volume, and rates are back to normal levels (after the initial effects of the Conference rate war), without the use of the exclusive-patronage system.

B. There is no public interest in favor of the exclusive-patronage system.

As previously stated, the existence of the exclusive-patronage system will not increase the movement of cargo, nor will the lack of such system stifle or prevent any cargo movements. The Petitions refer to the "general support" given to the system by the shipping public (Bd. Pet., p. 8; Conf. Pet., p. 9). These remarks have little foundation in fact. Neither the Board nor the Conference has established any right to speak for the shipping public in this respect. Both have been traditionally interested in espousing the interests of the steamship conferences. The shipper witnesses, appearing at the administrative proceeding gave no unqualified endorsement of the exclusive-patronage system (R. 33, 34). At least one shipper witness—*appearing on behalf of the Conference*—expressed his dissatisfaction with the differential between contract and non-contract rates (R. 33). Furthermore, neither the Board nor the Conference mentions that the only shipper witnesses to appear at the hearing were those of the Confer-

ence, imported from Japan by the Conference to testify at the proceeding.[16]

It would hardly appear consonant with the interests of the shipping public to promote a complete monopoly for the fixing of steamship rates. The Petition of the Board (Bd. Pet., pp. 10, 11), advances the curious argument that the effectuation of a conference monopoly, by use of the exclusive patronage system, is necessary to protect the higher-cost United States-flag operators. (Incidentally, Isbrandtsen is such a United States-flag operator.) In other words, the Board proceeds upon the assumption that Conferences fix rates to allow a profit to the highest-cost operator in the trade. It should be noted that the facts alleged in these arguments of the Board's Counsel were not presented at the administrative hearing, and the alleged facts involved are not so free from contention as to be within the realm of official or judicial notice. More importantly, however, the arguments are logically as well as legally absurd on their face.

The Federal Maritime Board is empowered and indeed directed to grant construction and operating-differential subsidies to United States-flag carriers under Titles V and VI of the Merchant Marine Act, 1936, as amended, 46 U. S. C. secs. 1151, *et seq.* The purpose of these subsidies is to place the United States-flag carrier on a parity with respect to operating and construction costs with his foreign-flag competitors. No similar policy of subsidy is announced in the Shipping Act of 1916, which is primarily a

---

[16] The lack of shipper testimony in opposition to the powerful Conference Monopoly is not surprising. In the most recent book on the subject, *International Shipping Cartels*, (1953) by Daniel Marx, Jr., a professor at Dartmouth College, reference is made (p. 54) that the Alexander Committee (Vol. 4, pp. 5, 59) noted that very few shippers were willing to testify, fearing retaliation, and that the Report of the English "Royal Commission on Shipping Rings", found likewise, that shippers, in fear of reprisals, were afraid to testify.

regulatory act similar to the Interstate Commerce Act, 49 U. S. C. sec. 1, *et seq.* If the subsidy program places the United States-flag carrier in a position of parity with respect to foreign costs, why should the shipping public be required to pay a further subsidy, by way of rates fixed by foreign-dominated conferences to allow a profit to the high-cost American-flag carrier irrespective of subsidy? The suggestion is preposterous—the only real beneficiaries of such an astounding program would be the lower-cost, foreign-flag carriers, which thereby receive windfall profits and American shippers would be the involuntary donors.

The position of foreign-flag carriers in such monopolistic conference arrangements is obvious. Their interests of course are quite real, but they do not constitute the public interests of this country. There are 125 Freight Conferences on file with the Board, organized pursuant to agreements under Section 15 of the Shipping Act. As previously stated, 62 of these conferences employ the exclusive-patronage system, although only 10 have any non-conference competition whatsoever. These 125 Conferences are composed of 346 member lines, of which 305 are foreign lines and only 41 are American. In each conference trade, the foreign lines dominate, by reason of their numbers and consequent voting privileges, in some instances by as much as 22 to 1.[17] (These figures obtained from public records of Board).

There are over 75 American liner companies engaged in the foreign commerce of the United States. Only 41 of these lines belong to any Conference, and only 24 are members of Conferences which employ the exclusive-patronage system. The Board's arguments concerning "the public importance" of its position are certainly misconceived in view of these facts.

---

[17] "Importance of the outcome to the parties is not enough", stated Mr. Justice Frankfurter in his dissenting opinion (p. 17), rendered February 25, 1957, in Nos. 28, 42, 46, and 50, *Rogers* v. *Missouri Pacific R. Co.*, and three other cases.

C. Petitioners could not prevail on the merits.

The Petitioners' arguments on the merits raise two primary contentions: (1) they argue that the decision below overturns administrative and judicial decisions (Bd. Pet. p. 14, Conf. Pet., pp. 12, 14); and (2) they further contend that the decision below is contrary to the construction of Section 14, Third of the Shipping Act as evidenced by the *legislative history*. These arguments are 99 per cent fallacious—the only part which is correct is that the Court below has overturned the Board's administrative decisions approving exclusive-patronage systems.

In the ensuing sections of this brief, Isbrandtsen will show that the Court of Appeals was not only correct in holding the exclusive-patronage system illegal under section 14 of the Shipping Act, but could also have held the system unduly prejudicial and unjustly discriminatory in violation of sections 15, 16, and 17 of the Act. Furthermore, it will be shown that the system could never be legally approved because it involves an agreement with shippers who are not "persons" subject to the Shipping Act, and who cannot consequently receive any immunity from the Anti-Trust laws, and that the Board's interpretation would render the Act unconstitutional.

Briefly, at this point it may be pointed out that the long-standing administrative interpretation referred to in the Petitions (Bd. Pet., p. 14; Conf. Pet., p. 12) has not been as consistent as Petitioners would imply. Prior to 1927, the Board's predecessor, the United States Shipping Board held the system illegal. *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S. B. 41 (1922). The Statutory District Court in *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883 (S.D.N.Y. 1951), remarked that

> "the Board's decisions (none of which approving a dual-rate provision has heretofore come to court) *have lacked uniformity and consistency; and in such circumstances, administrative interpretations have little weight.*"

The Petitioners' claim that the decision below overturns judicial decisions is astounding. This Court will undoubtedly be surprised at Petitioners' contentions that it has previously held the exclusive-patronage system lawful, by implication, through its action of remanding cases to the Board on the ground of primary jurisdiction (Bd. Pet., p. 18). The Board itself on various occasions has been more frank concerning the status of these judicial decisions. For example, Chairman Clarence Morse of the Board, in hearings on February 7, 1957 (six days after the filing of the Petitions), before the Committee on Merchant Marine and Fisheries of the House of Representatives, engaged in the following colloquy with Representative Allen of California:

> MR. MORSE: ". . . Now, for the information of some of the members of the committee, a dual rate system is nothing more or less than an exclusive patronage contract under which a given shipper contracts with the conference that he will ship all of his shipments moving in foreign trade on vessels of the member lines of the conference. For many years the Board has consistently ruled that the dual rate system is lawful under the 1916 Act. The question has been raised in several court cases and in *none of them with a definitive answer*, in my personal opinion, but as a result of this ruling of the Board in the Japan-Atlantic conference, the matter went to the Federal Court of Appeals here in Washington and it was ruled that the system was unlawful per se.[18] Applications for certiorari to the Supreme Court were filed just last Friday, I believe, and if the Supreme Court grants the writ of certiorari, which I hope it will do, the matter will be finally determined by the Supreme Court as to whether the system is or is not lawful.[19]

---

[18] The decision referred to is the decision of the Court below herein.

[19] Contained in the above testimony is the intimation that the Board will not consider the Court of Appeals' decision without affirmance by this Court as binding—a fear which Isbrandtsen has

MR. ALLEN: "In other words, then, the courts have ruled that the opinion held by Maritime over the years was not in accordance with law?
MR. MORSE: "*Some* courts have so held. There has been intimation by an earlier Supreme Court that the system was not unlawful per se. It was purely dictum by the Supreme Court in that early case."[20]

There is no mystery about what the Courts have done in previous cases involving the exclusive-patronage system. Until the present decision of the Court below, holding the system illegal, that question had never been decided by any court. How then could the decision of the Court below have overturned anything except the Board's own administrative decisions?

Petitioners' contentions concerning the interpretation of the Act are erroneous on their face. The Act is quite clear without resort to legislative history. But if such legislative history is to be examined, this history makes it absolutely plain that the system is illegal. Congress intended to outlaw every exclusive-patronage device of this sort, and the only reason it did not condemn this very system in *haec verba* was that *it was not then in use.*

In his opinion in the Court of Appeals Judge Washington stated

---

expressed above. This intimation by the Board's Chairman becomes more explicit in the following colloquy:

Mr. Allen: "I would take it then that the present situation is that Maritime holds the same opinion as to the legality the ruling of the Court to the contrary notwithstanding.
Mr. Morse: "We have not been satisfied that the decision of the Court of Appeals is the last word . . ."

[20] The case referred to is undoubtedly *Swayne & Hoyt* v. *United States*, 300 U.S. 297 (1937), which we shall discuss infra pp. 55-59. This language of this case which the Board's Chairman refers to as "purely dictum" is referred to in the Board's Petition as a "holding" of this Court (Bd. Pet., pp. 14, 18). Similarly, the Conference also urges that the "footnote" involved in the *Swayne & Hoyt Case* was "not dictum" (Conf. Pet., p. 19).

". . . the fact is that the contracts examined by the Alexander Committee in 1913 were materially different from the contracts before us now." (R. 251)

"Second, and more significant, is the fact that the contracts considered in *Swayne & Hoyt* closely follow the outlines of the contracts reviewed by the Alexander Committee in 1913, which are materially different from the contracts in this case, see text *infra*." (R. 250, footnote 2).

II

THE COURT OF APPEALS CORRECTLY HELD THAT THE EXCLUSIVE PATRONAGE SYSTEM CONTRAVENES SECTION 14, THIRD OF THE SHIPPING ACT.

It is quite significant that the Petitions devote only a few pages to attacking the real basis of the decision of the Court of Appeals, *viz.*, the Court's holding that the system violates section 14, Third of the Shipping Act (Bd. Pet., pp. 24-26; Conf. Pet., pp. 21-23). It seems unnecessary in this brief to analyze these arguments of Petitioners at length, for precisely the same arguments were made to the Court of Appeals, and no prolonged discussion need be added to the cogent and decisive reasoning of the Court below rejecting each of them.

Section 14, Third of the Shipping Act is undisputably clear on its face. It provides as follows:

> "No common carrier by water shall, directly or indirectly, . . .
>
> "*Retaliate against any shipper* by refusing or threatening to refuse, space accommodations when such are available, *or resort to other discriminatory or unfair methods, because such shipper has patronized any other carrier* or has filed a complaint charging unfair treatment, or for any other reason."

The Board and the Conference have always had trouble in facing up to the plain words of the statute, and, on a variety of misconceived arguments, they have squirmed to avoid these unequivocal proscriptions. The Board in its

present petition would seek to overcome the clear words of the statute by regarding most of its language as surplusage and by then distorting what remains (Bd. Pet., p. 25).[21] In this respect, the Board argues that the only retaliation which is prohibited is "(a) the forfeiture of accrued rebates, and (b) the blacklisting of shippers by a denial of space for future shipments even at the full rate" (Bd. Pet., p. 25). It is sufficient to say that if Congress had intended to prohibit only these malpractices, already condemned in section, First, it certainly would not have inserted the additional clear proscriptions contained in section 14, Third. Both the Board and the Conference leave unexplained the words, "or resort to other discriminating or unfair methods," and they choose to ignore the language, "because such shipper has patronized any other carrier."

The incredible arguments contained in the Board's Petition are joined in, at least in part, by the Conference (Conf. Pet., p 21). The Board and the Conference Petitions are, however, in disagreement with the Board's Report, which they are apparently defending, for the Board was originally willing to overlook all words in the statute except "retaliation," and for the "proper" definition of that word—out of context—it resorted to the lexicographer. In this respect, the Board had stated in its Report that:

---

[21] Curiously enough the Board argues contrary to its "surplusage" argument in construing the words of section 14, Third, when it states that section 14, Third could not outlaw the deferred rebate system because this system is already prohibited in section 14, First (Bd. Pet., p. 20). Incongruously, however, the Board admits subsequently that section 14, Third does prohibit two features of that system, *viz.*, (a) the forfeiture of accrued rebates, and (b) the denial of space accommodations (Bd. Pet., p. 25). It is inconceivable to the Board that the language of the statute means precisely what it says and that Congress intended to prohibit any similarly conceived exclusive-patronage device that retaliated or resorted to other discriminatory and unfair methods against a shipper, because the shipper would not give his exclusive patronage to the carrier.

". . . To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as 'to return like for like' or 'evil for evil.' Retaliation perhaps connotes the idea of vengeance. . . . We cannot view the adoption of the dual rate system or the charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage as a 'retaliation.' The higher rate cannot be said to be charged as a retaliation for 'patronizing any other carrier.' It is charged because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier. A non-signing shipper who does not patronize a non-conference carrier is treated as harshly as a non-signing shipper who ships partially or exclusively with such a carrier." p. 58).

The answer of the Court of Appeals to this nonsense was far too mild. Judge Washington, in his concurring opinion, in which Judges Prettyman and Fahy concurred, stated:

"The crucial question on this appeal is of course whether Section 14, Third, of the Shipping Act of 1916 proscribes the type of contract here involved.

"In the first place, it seems clear that in actual practice the contract system is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so. Is this 'retaliation,' proscribed by the Act? Certainly there seems no reason to limit 'retaliation' to the dictionary definitions of 'returning like for like' or 'evil for evil,' which have been selected by the Board. The very example used by the statute, boycotting for use of another carrier, is not 'like for like,' nor are the boycotting carrier or group of carriers necessarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results.

"Are these contracts, then, the sort of 'discriminating or unfair methods' that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303 (1937), a contract system

> under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is "prima facie discriminatory.' Nevertheless, the Board urges that the literal meaning of the statute should not be followed." (R. 249, 250). [footnotes omitted].

It is difficult to imagine a clearer case of "discriminatory or unfair methods" against a shipper because such shipper has patronized another carrier than the exclusive-patronage system. Even if these words were to be overlooked, and the all emphasis were to be placed on the word, "retaliation," as used in the statute, the arguments of the Board and Conference are obviously groundless.

The Board is speaking with no relation to reality when it states that the Conference is retaliating against the shipper who will not give his exclusive patronage to the Conference only "because the shipper does not sign the contract" (R. 58). The Board refuses to look at the *real* purpose of the contract which is to prevent the patronizing of any non-conference carrier. Under the Board's interpretation, the prohibition against retaliation would be meaningless and without any force whatsoever, because the carrier would always be able to avoid this prohibition by the mere device of holding out any sort of exclusive patronage contract to the shipper which would prohibit him from patronizing other carriers, thereby enabling the carrier to contend that the unlawful retaliation was *only because the shipper did not sign the contract.*

Neither Board (R. 58) nor the Conference (Conf. Pet., pp. 21, 22) could scarcely be serious in suggesting that the Conference regards the mere signing of the exclusive-patronage contract as determinative. Of course, the Conference members are not interested in a mere paper transaction—they are concerned only in preventing shippers from patronizing their non-conference competitors, and thus, of course, obtaining all of the shippers' business.

The exclusive-patronage system "retaliates" or "resort[s] to other discriminatory or unfair methods" against shippers in at least two obvious respects: First, it discriminates against the shipper, who would choose to maintain his independence of choice to patronize a non-conference line, by exacting from him the higher non-contract rate; and secondly, it discriminates against the "contract shipper" (who has signed an exclusive-patronage contract) for his act of employing a non-conference carrier by imposing a severe penalty upon him. Both of these "retaliations" or "discriminatory or unfair methods" are imposed precisely because "such shipper has patronized [another] . . . carrier," which are the very words of the prohibition in section 14, Third.

Neither the Conference nor the Board have even undertaken to answer the second "retaliatory" or "discriminatory or unfair" feature of the system, *viz.*, the penalty imposed on the "contract shipper" for patronizing an independent carrier. This retaliation is most invidious when it is realized that the "contract shipper" is economically coerced into signing the exclusive-patronage contract—as the Board's Report admits (R. 35)—and when it is realized that the threat of this severe penalty would tie the "merchants to a group of lines" in perpetuity.[22]

---

[22] This is one of the main reasons why Congress specifically condemned the deferred-rebate system which was then in use as the Board's Petition admits (Bd. Pet., p. 22). It is precisely why the present exclusive-patronage system would have been specifically condemned if it *had* been in use, and one reason why it is prohibited under section 14, Third. The Board has been willing to overlook this insidious feature of the exclusive-patronage system which keeps shippers practically forever within the conference fold just as effectively as the deferred-rebate system. Any "cancellation privilege" to the shipper (requiring three months' or more notice) is illusory if there is no independent carrier in the trade adequate to satisfy the shipper's needs on a year-round basis.

III

THE LEGISLATIVE HISTORY OF THE ACT OFFERS NO SUPPORT TO THE PETITIONERS

The legislative history of the Act is divided into two phases:

First, the United States House of Representatives on February 24, 1912 and June 18, 1912 adopted resolutions directing the Committee on Merchant Marine and Fisheries to conduct an investigation of steamship conferences. That Committee, under the Chairmanship of Hon. Joshua W. Alexander of Missouri, gathered data and testimony over a period of nearly two years. The records of the proceedings were published in four volumes and constitute the preliminary report of the Committee.[23]

Secondly, after the printing of the initial Alexander Committee Report in 1914, several bills were introduced and extensive hearings were held in both the House and the Senate.

The Petitions of the Board and the Conference rely entirely on a distortion of the initial Report of the Alexander Committee (Bd. Pet., p. 24; Conf. Pet., p. 19). Even this initial Report, however, lends no support to Petitioners. The Report itself is published in four volumes; more than three and one-half of the volumes are devoted to summarizing the evidence and testimony received, and the end of the fourth volume contains a digest of the *arguments* presented to the Committee, together with the Committee's recommendations for legislation. It is important to recognize the actual status of this preliminary Report of the Alexander Committee, because the portions relied upon by the Petitioners are actually nothing more than a summary of *arguments* which had been made to the Committee at the hearings. Most of the arguments, of course, were made by

---

[23] *Investigation of Shipping Combinations*, H. R. Doc. 805, 63d Cong., 2d Sess. (1914).

the conferences themselves and their member lines. If such self-serving arguments made to a Congressional Committee could ever have a proper standing in the "legislative history" of an Act, it would certainly be held remote at best, and could hardly be considered determinative in interpreting the plain and unequivocal language of the statute.

The legislative history of the Act is precisely clear that Congress intended to preserve independent competition and to prevent discriminations by conference lines against shippers. Conference were allowed to exist, pursuant to section 15 of the Act, only as a matter of privilege, not of right, and their activities were intended to be subject to the closest scrutiny and to all statutory proscriptions in the Act. Congress clearly prohibited in principle the exclusive-patronage system, which has the primary purpose of eliminating and suppressing independent competition. In this respect, it specifically prohibited all such exclusive-tying arrangements or unfair monopolistic practices *then in use* by conferences—and the only reason that the present type of exclusive-patronage system was not specifically condemned was that *it was not then in use.* The present exclusive-patronage system is similar in all essential respects to the specifically outlawed exclusive-patronage-*deferred-rebate* system which was then in use.

In *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 306, 307 (1937), this Court stated that,

> "As the Secretary has interpreted the evidence, the operation of the contract system [exclusive-patronage system], in the circumstances of this case, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by Section 14 of the Shipping Act."

A. The initial report of the Alexander Committee offers no support to petitioners' position.

As stated above, the first three volumes of the initial Report of the Alexander Committee and more than one-half

of the fourth constitute merely a summary of the testimony of the witnesses (see 53 Cong. Rec. 8095). The latter part of the fourth volume contains a summary of the *arguments* which were presented to the Committee.[24] *This preliminary or initial Report of the Alexander Committee does not contain any proposed draft of legislation for a shipping bill.*

The Committee had made certain recommendations at the end of this preliminary Report, which have been traditionally ignored by the Board and the Conference.[25] The Committee expressed concern over various unfair methods then used by conference lines "to meet the competition of non-conference lines" (p. 417). There is contained in these specific recommendations not the slightest hint that the Committee approved any exclusive patronage arrangements with shippers, whether the rebate involved be deferred or *pre*ferred, as is the case of the present substitute for the deferred-rebate system. In this respect, the Committee, in fact, expressly condemned such practices, in the following explicit recommendation for legislation (p. 421):

> "That rebating of freight rates to shippers be made illegal; and that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers, or ports, in the matter of rates and space accommodations be prohibited. In this connection *it is the belief of the committee that water carriers should be required to charge equal rates to all* shippers irrespective of the volume of freight offered for shipment."

In the face of its specific recommendation that "rebating of freight rates to shippers be made illegal," how could

---

[24] Volume 4 contains 424 pages, and the Summary begins at page 281 and continues through page 415.

[25] These specific recommendations comprise nine pages out of several thousand. They are the *only* recommendations of the *Committee* in its Report.

the Committee have given any "implied approval" to the exclusive-patronage system now before this Court, as the Board Petition suggests (Bd. Pet., p 21)? The suggestion is preposterous on two counts: first, the system was not *then* in use, as we shall prove below, and as the Court of Appeals has already found; and, secondly, the language relied on by the Board for such "implied approval" was merely an *argument* made *to* the Committee.

The Court of Appeals below has specifically rejected this "implied approval" argument of the Board and the Conference. Judge Washington, in dismissing this argument stated:

> "Were the premise sound, the argument would have some merit. But the fact is that contracts examined by the Alexander Committee were materially different from the contracts before us now." (R. 251).

Shortly before the Alexander Committee's investigation, the conferences had become concerned over the illegality of the deferred rebate system, and such rebates were abandoned in some trades, especially in the export trades of the United States (p. 288). Apparently, as the deferred rebate system was abandoned, the system was replaced by simple contracts of carriage, specimens of which are contained in Volume One of the Committee's Report (pp. 97, 248, 249, 251, 258). These contracts were not at all like the deferred-rebate system, or its modern counterpart, the preferred rebate system. The limited contracts of carriage before the Alexander Committee were fully described in the opinion of Judge Washington, and by the Court below as follows:

> "The 1913 contracts were bona fide *requirements* contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually 6 months), the price figure in the contract represented a hedge on the part of both parties against fluctuations

> in rates. *In the contracts in suit the carriers' commitments as to space is almost illusory,* being a commitment to carry "so far as regular services are available." The price aspect of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract—guarantee of supply and guarantee of no rate increase—are lacking. In their stead are two essentially penal provisions—the higher rate the liquidated damage clause—*both imposed to coerce shippers to refrain from using non-Conference carriers. These differences are dispositive of the Board's principal argument.* Implied Congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of "discriminating or unfair methods." They must therefore be condemned." (R. 251, 252).

It was apparently argued to the Committee that these "requirements" contracts were not as objectionable as the deferred-rebate system. Herein lies the key to the Board's distortion of the Committee Report and to the repetition of the argument in a footnote by this Court in the *Swayne & Hoyt* case. Under the heading "Advantages of Shipping Conferences and Agreements in the American Foreign Trade" (p. 295), the Alexander Committee Report summarized various *arguments* made *to* it. The summary was not represented as the *Committee's* views, and, in fact, it is specifically stated in a footnote that:

> "This summary represents the views of leading exporting and importing firms operating at our most important ports." (p. 295)

It is emphasized throughout that these were the *arguments "presented to the Committee"* (Ibid.).

In a similar fashion, the Committee summarized the "*Dis*advantages of Shipping Conferences and Agreements, as Now Conducted" (p. 304). One of the objections listed concerned the deferred-rebate system, which was argued to be objectionable because it tied "the merchant to a group

of lines for successive periods" (p. 307). The Committee went on in its summary of this *argument* to state that:

> "In this connection, it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system." (p. 307).

Over the years, proponents of the System have often deleted the words "it is argued". In its Petition herein the Board does not omit those words but instead submits a most extraordinary interpretation of the language quoted above, stating, in italics "It is most significant that the Committee here took pains to distinguish this condemned system from the ordinary contract system." (Bd. Pet., p. 22). Of course, the Committee did no such thing!

There can be no doubt that this language from the Alexander Report was not a recommendation of the Committee, but merely a summary of an *argument* made *to* it. Even if the Committee had been referring to the exclusive-patronage-*preferred* rebate system (*which it was not*, because that system was not then in use), the language could not possibly constitute an "endorsement" of such system.

B. Congress intended to preserve independent competition and to prevent discrimination.

A comparison of the preliminary Report of the Alexander Committee,[26] with the statutory proscriptions in section 14 of the Act, compels the conclusion that the Committee and the Congress intended to prohibit every type of concerted conference activity that might be the vehicle for eliminating or preventing independent competition. In its discussion of the subject "Meeting the Competition of Lines Outside the Conference," the Committee set forth various methods

[26] Page references given above to the Alexander Committee Report are to *Investigation of Shipping Combinations*, House Committee on Merchant Marine and Fisheries, H. R. Doc. 805, 63d Cong., 2d Sess., pp. 287 et seq.

they used by conferences to accomplish this pernicious purpose:

(a) The deferred rebate system (p. 287);

(b) Collective competition against a single carrier through the use of fighting ships (p. 289);

(c) The use of contracts, either jointly or individually by conference members, which provided preferential rates in exchange for the shipper's agreement not to patronize another carrier (p. 290); and

(d) The use of contracts providing preferential rates based on the volume of shipments (p. 291).

These specific conference practices outlawed as crimes in section 14 of the Act, are patterned precisely, both in substance and sequence, after the Committee's enumeration of devices used to eliminate competition:

(a) deferred rebates are barred by sub-section 1 of section 14;

(b) the use of the fighting ship is prohibited by sub-section 2 of section 14;

(c) discrimination or retaliation against a shipper for patronizing a non-conference carrier is prohibited by sub-section 3 of section 14; and

(d) unjust discrimination based upon volume of shipments is forbidden in subsection 4 of section 14.

In view of this precise correlation between the Report and the Act, it is clear that Congress adopted a regulatory scheme intended to prohibit each and every device, which had for its purpose the elimination or suppression of non-conference competition, including the presently proposed exclusive-patronage-contract system.[27]

[27] It is interesting to note that the Alexander Committee recommended the prohibition of deferred rebates despite the fact that

In section 14(3), Congress sought to reach every discriminatory device, contract or otherwise, designed to retaliate against a shipper for patronizing any other carrier or for any other reason. In fact, if the reference in the section to retaliation by "resort to other discriminatory or unfair methods" is not to be disregarded as surplusage, it must necessarily be read as covering practices not prohibited by name. No other view is consistent with the remarkable correlation between the four types of devices considered by the Committee under the caption "Meeting the Competition of Lines Outside the Conference" and the four types of device banned by Congress in section 14.

Of course, Congress did not stop with section 14 in its effort to prohibit unfair and discriminatory practices which were employed by conferences and common carriers. Section 14 in this respect prohibits unfair and discriminatory practices employed for retaliatory purposes. But even if the present system were not retaliatory—as the Court of Appeals has held it clearly is—it is fatally defective and necessarily illegal when measured against the further statutory proscriptions against unjust discrimination, undue prejudice, preferences, and unfair practices or methods set forth in section 15, 16 and 17 of the Act.

C. The present type of exclusive patronage system was never before the Alexander Committee.

The only essential difference between the deferred-rebate system described by the Alexander Committee (p. 287) and the present *pre*ferred-rebate system is merely the difference between a deferred and a *pre*ferred rebate. Obviously, neither the Committee nor Congress would have been so naive as to condemn the former and approve the latter, at least without considerable discussion.

---

it found (p. 288), "the deferred rebate systems now in use are equally open to all shippers who agree to give exclusive patronage, and are granted without discrimination as regards the size of individual or total shipments," an argument now advanced in support of the present *pre*ferred-rebate system.

Until the recent unfounded assertions by the Board that the Alexander Committee gave its "implied approval" to the exclusive-patronage system (Bd. Pet., p. 21), it has generally been recognized that the system was not employed in American commerce until several years after the passage of the 1916 Act. A memorandum before the Board, dated June 16, 1926, in a proceeding known as *Ex Parte 5, Contract Rate Investigation* (subsequently dismissed on March 3, 1927, and strangely not reported) states that the exclusive-patronage-contract system *was first used* in 1922 in the North Atlantic United Kingdom Freight Conference Trade in connection only with the carriage of automobile tires. The author of this memorandum was the Chief of the Board's Bureau of Regulation and it is in the "official records" of the Board.[28] The Board's Regulation Chief, the officer normally charged with the duty to advise the Board on such matters, was obviously in a far better position *in 1926* to determine when the system was first used than the Board's present Counsel are today.

D. Subsequent legislative history after the initial report of the Alexander Committee makes it clear that the exclusive patronage system is illegal.

After the printing of the initial Alexander Committee Report in 1914, Congress was not inactive with respect to shipping legislation. H. R. 10500 (the original shipping bill) was introduced on January 29, 1915, and hearings were held from February 10 to March 9, 1915 (53 Cong. Rec. 8074). Additional hearings were held between April 13 and 22, 1915. Various other shipping bills were introduced and considered: H. R. 18518, 63rd Cong; H. R. 3728, 63rd Cong.; H. R. 450, 64th Cong.; H. R. 10500, 64th Cong.;

---

[28] Isbrandtsen's counsel obtained access to the above memorandum by inspecting the minutes of the Shipping Board of March 3, 1927, which are public and may be inspected by interested parties pursuant to Rule 1(e) of the Board's Rules of Practice and Procedure.

H. R. 14337, 64th Cong.; H. R. 15455, 64th Cong.; H. R. 15565, 64th Cong.

Hearings were also held on H. R. 14337 before the House Committee between April 13 and 22, 1916. H. R. 15455 was the bill that eventually passed and it was extensively debated in the House and in the Senate, where it was substantially amended. In this entire legislative history of the actual drafting of the Act there is *not one single mention* of any exclusive-patronage-contract system other than the deferred-rebate system.

Representative Saunders of Virginia, in explaining the regulatory proscriptions of what is now section 14 of the Act, on the floor of the House, had no difficulty in expressing its clear meaning, which would condemn the present system (53 Cong. Rec. 8105):

> "What is the rest of that section? Not only are deferred rebates eliminated, not only are 'fighting ships' prohibited, but a carrier is forbidden to retaliate against any shipper who refuses to use that particular line in the shipment of his freight. *Do you think that a carrier ought to be allowed to put a black mark against you, or retaliate against you, when you make your choice of another line, or ship to carry your freight?*"

Senators Cummins on the floor of the Senate expressed great concern that ordinary rebates "just as obnoxious to common sense and good reason" as deferred rebates might be permitted (53 Cong. Rec. 12449). Senator Fletcher explained that such a result would not occur and quoted the remarks of Dr. Johnson, a drafter of the bill, before the House Committee on H. R. 14337.

In other words, there was a frank recognition that Congress itself could not, in specific terms, conceivably outlaw in advance all possible methods of destroying outside competition which might be devised. It trusted to the alertness of the Board and the Courts to condemn subsequent "un-

fair" practices which might be invented for evading the statute.

IV

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY PRIOR DECISION OF THIS COURT OR OF ANY OTHER COURT.

The contention of Petitioners that the decision of the Court below is "inconsistent with" (Conf. Pet., p. 14) and "overturns" (Bd. Pet., p. 14) prior judicial decisions, including decisions of this Court, is most extraordinary. It has generally been conceded, as it was by the Board's own Chairman in his testimony before the House Merchant Marine and Fisheries Committee, on February 7, 1957 (six days after the present Petitions were filed with this Court),[29] and it is obvious from the cases, that until the decision of the Court below, there has been no definitive judicial decision on the legality or illegality of the exclusive-patronage system.

It is incredible, under the circumstances, that Petitioners could contend that the decision of the Court below is "inconsistent with" or "overturns" any prior judicial decisions.

All of the decisions presently relied upon by the Board and the Conference have been analyzed in the opinion of the Court of Appeals. After analyzing the cases, Judge Fahy stated:

> "From this situation in the Courts the Board contends that the dual rate system has not been considered invalid *per se*, otherwise the Courts would have disposed of these cases on that ground. This position is an arguable one; but the fact is that the cases do not decide the point." (R. 261).

Except for the *Swayne & Hoyt* Case, which will be discussed below, this Court is well aware that its previous

[29] See *supra*, pp. 35-36.

actions with respect to the exclusive-patronage system have either involved a denial of *certiorari*, *Isbrandtsen Company v. United States*, 211 F. 2d 51, cert. denied sub nom., *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U.S. 990 (1954), or a refusal to consider the question of legality on the ground that the Board had primary jurisdiction to consider the facts, *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1931); *Far East Conference* v. *United States*, 342 U.S. 570 (1951), or a refusal to consider the question of legality on the ground that the Board had not made proper findings of fact to support even its own reasoning, *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U.S. 950 (1952).

Neither the arguments of the Board nor the arguments of the Conference concerning the alleged legality of the exclusive-patronage system have ever prevailed in any case before this or any other Court. The Courts have refused to decide the issues of illegality heretofore raised primarily because of the Board's own procedural deficiencies and because of the Board's failure to exercise its primary jurisdiction. The Board's only success in these cases has been merely to have the cases remanded to it, a result it has consistently striven to accomplish.

(1) In *Isbrandtsen Company* v. *United States*, 81 F. Supp. 544 (S.D. N.Y., 1948), an injunction was granted to Isbrandtsen restraining a Board order purporting to allow the Eastbound and Westbound North Atlantic Conferences to institute the system. The injunction was conditioned upon Isbrandtsen's prosecution before the Board of a complaint. An appeal by the Conference and the Board to this Court was dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 336 U.S. 941 (1949).

(2) After the above decisions in the *North Atlantic* Case, Isbrandtsen prosecuted its complaint before the Board and appealed the Board's decision to the Statutory District

Court. In *Isbrandtsen Company* v. *United States*, 96 F. Supp. 883 (S.D. N.Y., 1951), affirmed by an equally divided Court, sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Company*, 342 U.S. 950 (1952), it was held on further appeal of the North Atlantic case, after Board proceedings, that the Board order dismissing the complaint of Isbrandtsen in that case was invalid because the differential between contract and non-contract rates was obviously arbitrary and therefore unjustly discriminatory. The Court specifically declined to decide the issue of legality in this case because of the obvious failure of the Board to make the necessary basic, pivotal, or constitutive findings to support even its own reasoning.

(3) In *Far East Conference* v. *United States*, 342 U.S. 570 (1951), this Court reversed a decision of the New Jersey District Court which refused to dismiss a complaint filed by the Department of Justice against the use of the system, based upon an alleged violation of the Anti-Trust Laws, the sole ground of this Court's reversal being that the Board had primary jurisdiction.

(4) In *Isbrandtsen* v. *United States*, 211 F. 2d 51 (D.C. Cir. 154), the Court of Appeals held, on the previous proceeding in this case, that the exclusive-patronage system constituted an agreement under section 15 and had to be approved, after hearing under section 15 of the Act, before any action could be taken under it by the Conference. The Board had claimed that such approval was not necessary and that the system should be allowed to go into effect without an opportunity for any hearing. Petitions for certiorari to this Court by the Board and by the Conference were denied, *F.M.B. et al.* v. *Isbrandtsen Company*, 345 U.S. 975 (1952).

In each of these cases to which the Board was a party, its *contentions were rejected* and *its orders were reversed*, although the Board repeatedly avoided a decision on the basic question of illegality. It is certainly audacious—to

say the least—that the Board's Counsel should now offer these decisions as support for their contention that the Courts have held the system not "illegal *per se*" (Bd. Pet., p. 18).

Similarly, there is no support in any of the other cases cited by the Board or by the Conference for the proposition that the system is not illegal *per se*.

Both the Board and the Conference cite *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1931), (commonly called the "Cunard Case") to establish their contention that the decision of the Court below is in conflict with that decision of this Court (Bd. Pet., p. 14; Conf. Pet., p. 14). Just how this case could possibly establish that proposition is difficult to perceive. The Cunard case was a suit by a private steamship company, under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27, against a group of steamship lines using the exclusive-patronage system. It was held by this Court that a *private party* could not entertain the suit for injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26, because the Shipping Board had *primary* jurisdiction over the factual subject matter of the complaint under the Shipping Act. Nowhere in the opinion of either this Court or the Court of Appeals therein is there the slightest indication of a holding that the system was "not illegal *per se*", for that issue was not decided.

The complete absurdity of the Board and Conference position is most fully apparent, however, in their strained analysis of the case of *Swayne & Hoyt* v. *United States*, 300 U.S. 297 (1936). The Board and the Conference virtually rest their case upon the language appearing in a footnote to this decision, which language was merely a repetition of an undisputed argument made by the parties in that case to this Court and was irrelevant to any issue raised in the proceeding (Bd. Pet., p. 14; Conf. Pet., p. 17). On the basis of the reasoning of the Board and of the Con-

ference, in fact, it is the first time in American jurisprudence that a footnote attached to a judicial opinion, *relating to an issue not raised in the case*, is offered as the major part of the Court's decision.

The *Swayne & Hoyt* case was an appeal by a Conference of a decision, by the Shipping Board Bureau (the then administrator of the Shipping Act) in *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936), holding that the exclusive-patronage system was not justified and was unduly prejudicial in violation of section 16 of the Act [when used in the intercoastal trade]. The question of the illegality of the system as such *was not pressed* by either party to the appeal. The Conference, the appellant, argued that the system must be approved and the Secretary of Commerce, representing the Shipping Board Bureau, sought merely to justify his decision on *the facts* in that case. There was, therefore, no "case or controversy" before this Court concerning the basic illegality of the system under any section of the Shipping Act, much less under any other statute or under the Constitution. *The Court was necessarily limited to the issues before it, which concerned the sufficiency of the evidence, and any further expression would have constituted an advisory opinion.*

In the review of the agency decision in the *Swayne & Hoyt* case, both the Statutory District Court [18 F. Supp. 25 (1936)] and this Court [300 U.S. 297 (1937)] held that the Secretary of Commerce was justified in holding that the system was unjustly discriminatory. The fact that there was no actual case or controversy before the Court on the fundamental illegality of the system *per se*, and, therefore no arguments presented to the Court alleging such illegality, accounts for the footnote on page 307 of this Court's opinion, which has been quoted, as creed, in every Conference and Board brief.[30] As explained above, the footnote

[30] The Court of Appeals below has commented upon this much heralded footnote, in the *Swayne & Hoyt* case, as follows:

contains certain incorrect conclusions conjured from the Alexander Committee Report to the effect that "the Committee did not condemn the contract system completely." The footnote goes on to say, however, that:

> "The policy of the statute may be properly applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41."

If this footnote were "a part of the decision, and not dictum," as Conference Counsel astoundingly asserts (Conf. Pet., p. 19), it would be ample reason for the basic *illegality* of the present system. The Board has frankly admitted that the unmitigated purpose of the system is to secure a complete monopoly (See Appendix C hereto). In the instant case, there can be no dispute that a monopoly would result. Therefore, "the policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly."

The *Swayne & Hoyt* case presented a most unusual spectacle, for there was *no* party to the case raising the question

---

"It is urged that footnote 3 of the Court's opinion in *Swayne & Hoyt* is some authority for exempting the contracts in this case from Section 14, Third. There are two answers to this argument. First, the Court was there concerned not with a recommendation of the Alexander Committee but with an argument that had been addressed to the Committee. See H. R. Doc. No. 805, 63rd Cong., 2d Sess. 307 (1914). Second, and more significant, is the fact that the contracts considered in *Swayne & Hoyt* closely follow the outlines of the contracts reviewed by the Alexander Committee in 1913, which are materially different from the contracts in this case, see text *infra*. The contracts in *Swayne & Hoyt* contained a firm price agreement that could not be varied during the term of the contract. See *Swayne & Hoyt* v. *United States*, 18 F. Supp. 25, 26 (D. D. C. 1936). (R. 264).

of the fundamental illegality of the system. The Board and the Conference admit that the Secretary of Commerce did not assert such a position. The Board's present Report points out that the agency decision, from which appeal was taken in the *Swayne & Hoyt* case, had stated that (R. 44):

> "Whether any such dual rate system (in foreign commerce) is lawful is a question which must be determined by the facts in each case."

This is obviously the argument that was presented to the Court by the Secretary of Commerce, as Respondent. It is not surprising, therefore, that the Court, under such circumstances, did not hold the system illegal *per se*, for it would have been deciding a question on its own initiative that was neither raised, argued, nor briefed. The Court, confronted with this unusual situation, did no more than repeat the analysis made by the Shipping Board Bureau. Even if the Court had reversed the Shipping Board Bureau, it would not have constituted a holding in favor of the *legality* of the system, because the legality of the system just was not an issue in that case, either before the Court or the administrative agency.

Furthermore the only section of the Shipping Act *in any way involved* in the *Swayne & Hoyt* case was *Section 16*—not Section 14(3) or any other section. The proscription of Section 16 is analogous to that of Section 3 of the Interstate Commerce Act. But the basic illegality of the system was not in issue *under even that section*—only the agency's factual determinations were in issue. The far more serious questions of illegality under Section 14, 15 and 17 of the Shipping Act, and under the Anti-Trust Laws (because the system involves parties not subject to the Shipping Act), and the Constitutional issue were in no way raised in the *Swayne & Hoyt* case and *had never been decided by any court*, prior to the instant decision of the Court of Appeals below, herein.

This analysis of the cases is fully confirmed by the Court of Appeals below. Judge Fahy, in this respect, stated the opinion of the Court as follows:

> "We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. We have already referred to *Swayne & Hoyt, Ltd.* v. *United States, supra*, which, though it upheld the Board in condemning the dual-rate system there involved, did not rest upon section 14, Third. In *Far East Conference* v. *United States*, 342 U.S. 570, the court, adhering to principles previously laid down in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, required the District Court to dismiss a suit of the United States which attacked the dual-rate system as violative of the Sherman Act, without the particular system having been passed upon initially by the Board. And in *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U.S. 950, the court by an equally divided vote affirmed *Isbrandtsen* v. *United States*, 96 F. Supp. 883, which had invalidated the dual-rate system there involved, not under Section 14, Third, but because the spread between the two rates was found to be arbitrary . . ." (R. 260, 261).

In view of this situation before the Courts, it will undoubtedly be a great surprise to this Court that the Board would dare to assert that there has been even an implicit or tacit ruling on the legality of the system by any Court.

V

THE EXCLUSIVE-PATRONAGE SYSTEM IS FUNDAMENTALLY UNLAWFUL FOR VARIOUS REASONS OTHER THAN THE VIOLATION OF SECTION 14, THIRD.

In addition to the basic and unavoidable illegality of the exclusive-patronage system under Section 14, Third of the Shipping Act, as the Court of Appeals has held, the system is fundamentally unlawful for various other reasons. These other issues were not met in the decision of the

Court below, and it was unnecessary for the Court to meet them, in view of its holding that the system is unlawful under Section 14, Third. *The additional obstacles which the exclusive-patronage system would have to overcome in order to be rendered legal are of substantial importance, and constitute further cogent reasons why Petitioners have no chance of succeeding before this Court on the merits, and why THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.*

The exclusive-patronage system is also fundamentally unlawful for at least the following reasons:

First, it is unjustly discriminatory and unduly prejudicial in contravention of sections 15, 16 and 17 of the Shipping Act.

Secondly, the Board could never have any discretion or authority to approve the exclusive-patronage system because it involves as its main and most essential ingredient an exclusive-patronage contract to be entered into between common carriers and shippers, the latter parties not being "persons" subject to the Shipping Act nor consequently capable of receiving any immunity, under section 15 of the Shipping Act, from the Anti-Trust Laws.

Thirdly, the Board's interpretation of the Shipping Act would render section 15 of the Act unconstitutional, and consequently invalid, as an improper delegation of legislative powers and because it would deprive Isbrandtsen and other carriers of property without due process of law.

A. The exclusive patronage system is unjustly discriminatory.

The system is also necessarily and fatally illegal because it is unduly prejudicial and unjustly discriminatory in violation of sections 15, 16, and 17 of the Act. These are terms which have had a long and settled construction in Anglo-American transportation law—which construction it is necessary for the Board to disregard, in order to reach its preconceived conclusion that the system is not illegal.

Sections 15 and 17 of the Act prohibit, *inter alia*, common carriers from charging unjustly discriminatory rates.

Section 16 of the Act prohibits, *inter alia*, such carriers from giving undue or unreasonable preferences.

Section 17 of the Shipping Act in this respect has its immediate origin in and bears close resemblance to section 2 of the Interstate Commerce Act, 49 U.S.C. sec. 2,[31] which section was in turn derived from the so-called equality clause of the English Railway Clauses Consolidation Act of 1845.[32]

Section 16 of the Shipping Act—as the Board admits (R. 55)—was patterned after section 3(1) of the Interstate Commerce Act, 49 U.S.C. sec. 3(1), which in turn was adopted from section 2 of the English Railway and Canal Traffic Act of 1854.[33]

It is undisputed that the Alexander Committee in drafting the Shipping Act relied heavily on the previous regulatory experience of the Interstate Commerce Commission.[34]

---

[31] The legislative history of the Shipping Act is decisive that Congress intended that two shippers identically situated should not be obliged to pay different rates for the same transportation service. There is no doubt that the unjust discrimination proscription in section 17 of the Shipping Act was intended to apply the explicit proscription contained in section 2 of the Interstate Commerce Act of 1887. See House Hearings on H. R. 14337, 64th Cong., pp. 28-29, 31-32, 40, 84, 88-89, 110, 127, 139; Senate Hearings on H. R. 15455, pp. 146, 242, 243, 249, 250.

[32] See *Texas & Pac. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 222 (1895).

[33] See *Interstate Commerce Commission v. B. & O. R. Co.*, 145 U.S. 263 (1892); *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U.S. 197 (1896).

[34] The Committee studied the "decisions and files of the Interstate Commerce Commission." H. R. Doc. 805, 63rd Cong., 2nd Sess. (1914), p. 4. It furthermore hired as consultants two experts on railway transportation, Professors Huebner and Johnson of the University of Pennsylvania, who participated in the drafting of the bills.

In the light of this legislative history, various cases have held that it was the intention of Congress that the settled construction of the earlier Interstate Commerce Act *must* be applied to the Shipping Act, unless in particular instances some thing peculiar in the question under consideration, or dissimilarity in terms of the Acts, requires a different construction. *Inter-Island Steam Nav. Co.* v. *Territory of Hawaii*, 305 U.S. 306 (1938); *United States Navigation Co.* v. *Cunard Co.*, 284 U.S. 474 (1931 *supra*); *Prince Line* v. *American Paper Exports, Inc.*, 55 F. 2d 1053 (1932).

There has never been a judicial decision under the Shipping Act, the Interstate Commerce Act or under any other transportation act, which has held a discrimination in rates to be justified, where two different rates were charged for identical transportation services to similarly situated shippers. Despite the Board's attempt to avoid facing the problem, the exclusive-patronage system involves an admitted situation—which no one can escape—that of a common carrier charging two different rates for the *identical* transportation services to two similarly situated shippers from the same point of origin to the same destination, the higher rate being charged in retaliation for shipper's refusal to give the carrier its exclusive patronage. If this is not unjust discrimination, there is no such legal concept under the Shipping Act.

It is well settled that a discrimination in rates by a *common carrier* can only be "justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Central R. Co.*, 263 U.S. 515 (1924). The decisions are unanimous—with no authority to the contrary—that different rates for identical transportation services result in unjust discrimination. *Wight* v. *United States*, 167 U.S. 512 (1897); *Louisville & Nashville Railroad Co.* v. *Motley*, 219 U.S. 467 (1911); *Chicago, Ind. and L. Ry. Co.* v. *United States*, 219 U.S. 486 (1911); *I.C.C.* v. *Delaware, L. & W. Railroad*, 220 U.S. 235

(1911); *I.C.C.* v. *B. & O. Railroad*, 225 U.S. 326 (1912); *Fourche Lumber Co.* v. *Bryant Lumber Co.*, 239 U.S. 316 (1913); *Seaboard Air Line Ry. Co.* v. *United States*, 254 U.S. 57 (1920).[35]

In its hopeless groping for analogies—*there being none*—the Board has hit upon situations which are entirely irrelevant to this factual circumstances of this case. Thus the Board cites in its Report three cases *Eastern Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194 (1944); *Texas and Pacific Ry.* v. *United States*, 289 U.S. 627 (1933); *I.C.C.* v. *Alabama-Midland Ry.*, 168 U.S. 144 (1897), for the proposition that "carrier competition has been considered a factor to be weighed in justification of a prima facie discrimination or preference" (R. 55). These cases all arose under section 3(1) of the Interstate Commerce Act and concern the charge of unreasonable preference or advantage. *None of the cases involves the charging of different rates by a common carrier for the same transportation service.* Obviously, competition may be a factor in justifying a preference where *different* transportation services are involved. Thus a *motor carrier* may be justified in granting a *volume* discount in order to make its rates competitive with *railroad* rates, which was the situation in *Eastern Central Motor Carriers Ass'n* v. *United States*, *supra*. Similarly, where a carrier is offering a service to City C from both Cities A and B, it may be justified in offering a lower rate from A to C than from B to C, notwithstanding the fact that the distance from A to C may be the same or longer than the distance from B to C, because the carrier encounters competition from other carriers at the former points but not

[35] The cases at common law are in accord with this principle. In *Messenger* v. *Pennsylvania Railroad Co.*, 7 Vroom (36 N.J.L.) 407, 410 (1873), aff'd 8 Vroom (47 N.J.L.) 531 (1874), the Court said: "Recognizing this as settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions." See also *Menacho* v. *Ward*, 27 Fed. 529, 533 (C.C.N.Y., 1886).

at the latter. *Texas and Pacific Ry.* v. *United States, supra*; *I.C.C.* v. *Alabama-Midland Ry. Co., supra.* The Board has never—*and will never*—find a case,[36] however, holding that competition justifies a common carrier in charging discriminatory rates for identical transportation services in the transportation of the same kind—water, for instance—for shippers, similarly situated at the same point of origin, under identical circumstances and conditions.

Similarly, the Board in its persistent groping hits upon the volume discount, which it considers "highly analogous" (R. 56). The Court of Appeals below has held that the present exclusive patronage contracts are not "requirements" contracts, see *supra* pages 45 and 46. Admittedly "requirements" contracts may have legitimate utility when based upon *bona fide* considerations of cost and value of the services rendered. Cf. *Standard Oil of Cal.* v. *United States*, 337 U.S. 293, 306 (1949). Significantly the Board cites no court decisions to support its unfounded and perverted theory. Moreover, it had found in this very case that:

> "There would, under the dual rate system, be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes might be identical and identically destined." (R. 55).

The exclusive-patronage system has no relation to volume of cargo. The "contract shipper" does not agree to ship any cargo whatsoever—the shipper of one ton of cargo would receive the same rate as the shipper of 100,000 tons, while the non-signing shipper of 100,000 tons would pay the higher non-contract rate on every ton.

The Board's Report further contends that an unjust discrimination—not founded upon any transportation differ-

[36] Other than its own.

ences—can be defended on grounds of conference "self-protection" and "survival" (R. 60). Nothing in the Record nor in the Board's Report, nor elsewhere, supports the proposition that the exclusive-patronage system is necessary for or indispensable to the conference system.[37] Even if the Board's unfounded observation concerning the need for the system were a fact—which it is not[38]—the argument is legal irrelevant. *No one has had the temerity to suggest that the Board could approve the "deferred-rebate system" or the "fighting ship" because of some supposed essentiality of those prohibited devices to the survival of the conference system.* These same arguments of indispensability were offered unsuccessfully in defense of the exclusive-patronage deferred-rebate system before that system was specifically prohibited by the Shipping Act of 1916. In *Thomsen* v. *Cayser*, 243 U.S. 66, 87, 88 (1917), this Court rejected these traditional—and still persisting—arguments of the Conferences that exclusive-patronage arrangements were necessary and were beneficial to commerce in producing regularity of service and stability of rates, in its decision holding the exclusive-patronage deferred-rebate systems, there involved, to be in violation of sections 1 and 2 of the Sherman Act. In that case, this Court answered the plea of the monopolists concerning the claimed beneficial results of their monopoly as follows:

---

[37] Ironically enough, the only example furnished by the Record here of "cut-throat" competition, which the system is supposed to avoid, was the rate war started by the Conference itself on March 12, 1953 (R. 12).

[38] There is no support in the Board's findings of fact for the proposition that the exclusive-patronage system is essential for the continuance of the conference system. All evidence is, in fact, to the contrary. According to the Board's own records, of the 125 Conferences under its jurisdiction, only 62 use the system and only 10 of these Conferences have any non-conference competition whatsoever. This very trade has prospered without the use of the system, after the results of the Conference rate war have abated, and remunerative rates restored.

". . . And it finds no justification in the fact that defendants' 'contributions to trade and commerce' might 'have been withheld.' This can be said of any of the enterprises of capital, and has been urged before us to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the conduct of property embarked in the public service is subject to the policies of the law." 243 U.S. at 88.

B. The Board has no discretion ever to approve the system because it involves persons, as parties, who are not subject to the Shipping Act.

Section 15 of the Shipping Act provides for an extraordinary privilege, that of excepting certain agreements from the provisions of the Anti-trust Laws. *Only agreements between "common carriers" and "other persons subject to this Act,"* however, can ever receive such exemption. Shippers, in their capacity as shippers, are neither "common carriers" nor "other persons" subject to the Act as those expressions are defined in section 1 of such Act. *The present exclusive-patronage system involves, as its main and essential constituent, an exclusive-patronage contract to be entered into between the Conference (and its member lines) and shippers.* Such contracts or agreements with shippers as parties cannot be approved by the Board under the clear language of section 15, and consequently *cannot receive any immunity from the Anti-trust Laws.* While the conference system as such, may have immunity from the Anti-trust Laws, the exclusive-patronage dual rate system can never receive such immunity.

Stripped of any color of immunity, there can be little doubt that the system violates Sections 1 and 2 of the Sherman Act, 15 U.S.C., because it is an admitted combination or conspiracy formed with the purpose of restraining commerce, eliminating, suppressing, and preventing competition, and attempting to monopolize the trade. *The Court of Appeals—in the previous appeal of this very*

Japan-Atlantic case—recognized that, unless such agreements can be approved by the Board under Section 15 of the Act, they are "subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se." Isbrandtsen Company v. *United States*, 211 F. 2d, 51 (1953). Board and Conference Petitions for Writ of Certiorari in that case were denied by this Court, *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U.S. 990 (1954).

Certainly, insofar as the Sherman Act is concerned, the essential purpose of the exclusive-patronage system and the method for accomplishing them are no different than those of the exclusive-patronage deferred-rebate system—which was specifically outlawed by the Act. The case of *Thomsen v. Cayser, supra*—arising before the passage of the Shipping Act—constitutes a clear-cut holding of this Court that the exclusive-patronage systems violate sections 1 and 2 of the Sherman Act.

C. The Board's interpretation of the statute would render Section 15 of the Shipping Act unconstitutional.

There can be no question but that the Board is required to observe a strict interpretation as to the legitimate purview of Section 15 of the Shipping Act, inasmuch as it provides for a departure from prior public policy, the common law, and the provisions of the Anti-Trust laws. The Board's interpretation of the Shipping Act—insofar as such interpretation contemplates possible approval of the exclusive-patronage system—would render Section 15 of the Act unconstitutional, as an unlawful *delegation of legislative authority* in violation of Article 1, Section 8, paragraph 18 of the Constitution of the United States. *Schechter Corporation* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *Fashion Originators' Guild of America* v. *Federal Trade Comm.*, 312 U.S. 457, 465 (1941).

The Board's interpretation would confer upon the Conference, a private cartel, the absolute power to exclude any independent carrier from the trade unless the independent joined the Conference, dominated by foreign lines, and accepted its terms. This would be the equivalent of giving to this private monopoly the power to issue certificates of public convenience and necessity, with no statutory guide for their issuance.

The conferring of such authority on the Board, would, moreover, violate the due process clause of the Fifth Amendment, as exceeding the extent of permissible deprivation of property without *Due Process of Law*. Admittedly, the exclusive-patronage system is intended to achieve and to perpetuate a monopoly for the Conference and to force all independent competition either into the Conference or out of business. "This is coercion by economic pressure. The asserted power of choice is illusory." *United States* v. *Butler*, 297 U.S. 1, 71 (1936).

In *Frost Trucking Company* v. *Railroad Commission of California*, 271 U.S. 583 (1925), the question arose as to the constitutionality of a California Statute which prohibited a motor carrier from operating on the public highways of the State unless he had obtained a certificate of public convenience and necessity as a *common carrier*. The Frost Company was a *contract carrier* and was ordered by the State to suspend operations until a certificate had been obtained. The statute was held unconstitutional by this Court as violative of the due process clause of the 14th Amendment. It was held by this Court that a State cannot consistently with the due process clause require a private carrier to become a common carrier against his will.

Certainly the Federal Maritime Board could not consistently with due process require a non-conference carrier to become a conference carrier against his will.

The vice of the predatory power—passed on by the Board to the Conference—is even more alarming when it is recognized that the exclusive-patronage system would be applicable to "all commodities moving in the trade." It is thus intended to prevent and to suppress all independent competition, *viz., both common carriers and contract carriers or "tramps" alike.* While Petitioner, as a common carrier engaged in regular liner operations, might possibly be able to postpone its elimination from business, if the exclusive-patronage system were to be instituted, by joining the foreign-dominated conference, such a solution is not even open to contract or *tramp carriers* with which operators Conference lines are continuously in competition. Only *common carriers* are subject to the regulation of the Shipping Act, and tramp and other private or contract carriers are explicitly excluded from regulation. The latter carriers are *not*, therefore, eligible to become members of steamship conferences under Section 15 of the Act, thus disposing of the stock answers of the Board and Conferences that the Independent can join the Conference if he sees fit to stay in business.

CONCLUSION

Technically, Petitioners have not brought themselves within any Rule of this Court concerning grounds for granting the instant Petitions. They have no chance of success on the merits, and this Court should not be compelled to hear or consider further arguments thereon or to conduct further proceedings. Because Petitioners have no likelihood of succeeding before this Court on the merits, and because the decision of the Court of Appeals, holding the exclusive-patronage system unlawful in violation of Section 14, Third of the Shipping Act of 1916 is so eminently thorough and sound, and because this Court's answers to the other Questions presented to the Court of Appeals would reach the same result, the *Judgment of the*

Court of Appeals should be affirmed, without any further argument or proceedings. Short of such momentary Review, for the purpose of Affirmance of the Judgment below, the Petitions should be denied.

Respectfully submitted,

JOHN J. O'CONNOR,
Attorney for Respondent,
Isbrandtsen Company, Inc.
Washington Building,
Washington 5, D. C.

Of Counsel:
JOHN J. O'CONNOR, JR.
JOHN J. FOLEY
JOSEPH K. GRAINGER

Washington, D. C.
March 4, 1957.

Certificate of Service

I hereby certify that on this 4th day of March, 1957 I served copies of the above brief, personally on all the attorneys for the parties herein and also on the Solicitor General, Department of Justice and on the Federal Maritime Board.

.....

APPENDIX A

STATUTES INVOLVED

A. Pertinent Parts of Shipping Act of 1916 (46 U.S.C. § 801, et seq.):

§ 14 (46 U.S.C. 812):

Rebates and discriminations by carriers by water prohibited; use of "fighting ship"

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * *

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

* * *

§ 15 (46 U.S.C. 814):

Contracts between carriers filed with commission

Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner pro-

viding for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

§ 16 (46 U.S.C. 815):

Discriminatory acts prohibited

* * *

That it shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * *

§ 17 (46 U.S.C. 816):

Discriminatory rates prohibited; supervision by commission

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

* * *

B. § 2 of the Hobbs Act (5 U.S.C. § 1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board, or the Maritime Administration entered into under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to section 830 of Title 46.

C. Relevant Parts of the Constitution of the United States:

Article I, Sec. 1:

"All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Sec. 8, par. 18:

"The Congress shall have power to * * * make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *."

Amendment, Article V:

"No person shall be held to answer for a capital, or otherwise infamous crime unless, on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

D: Sections 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. Secs. 1, 2):

SHERMAN ACT[1]

[*Contract, Combination or Conspiracy in Restraint of Interstate or Foreign Commerce Illegal; Penalty*]

Sec. 1. [26 Stat. 209; 50 Stat. 693; 15 U.S.C. § 1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed

[1] Act of July 2, 1890, c. 647, 26 Stat. 209, 51st Cong., 1st Sess. (S. 2, Public 190), as amended by Act of March 3, 1911, c. 231, 36 Stat. 1167, and Act of Aug. 17, 1937 ("Miller-Tydings Act"), c. 690, 50 Stat. 693, 75th Cong., 1st Sess. (H. R. 7472, Public 314).

by others, when contacts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[*To Monopolize, Attempt to Monopolize, Combine or Conspire a Misdemeanor; Penalty*]

Sec. 2 [26 Stat. 209; 15 U.S.C. §2.] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX B

LAW OFFICES
JOHN J. O'CONNOR

29 Broadway
New York 6
Bowling Green 9-2348

Washington Building
Washington 5, D. C.
Republic 7-1080
Washington

July 1, 1954

Re: Steamship Conferences in foreign trade, illegally using the Exclusive Patronage Contract/non-Contract Dual Rate System, without having first obtained Approval under Section 15 of the Shipping Act, 1916.

Federal Maritime Board
Washington 25, D. C.

Dear Sirs:

One month has now passed since the Supreme Court of the United States, in cases Nos. 700 and 703, rendered its unanimous decision denying Certiorari to the United States Court of Appeals for the District of Columbia, for the purpose of reviewing the decision of that Court of Appeals, in the case of *Isbrandtsen Company, Inc.* v *United States, et al.*, rendered on January 21, 1954 and reported in 211 Fed. 2nd 51. That Decision held that such a System could not be used before it had been filed for approval and approved under Section 15 of the Shipping Act, 1916.

As is well known, the System binds Shippers, and certain Receivers, to give their exclusive patronage to the steamship lines which are Members of the particular Conferences, and to boycott all Independent common carriers, the largest and most important of which is my client, the American concern, Isbrandtsen Company, Inc., which uses American Flag vessels—bought from the U. S. Maritime Commission—in its Round the World and Trans-Atlantic services, especially.

The admitted prime purpose of these Conferences—"Cartels" is the correct name, as applied by our Courts, a former U. S. Attorney General and writers on the subject—is to achieve a monopoly on all the trade routes of the world, in favor, principally, of the Foreign Lines, which dominate all these Conferences on an average of about 10 to 1.

Isbrandtsen is the only American Company of consequence which has not been forced to join these International Cartels, in order to survive, as the shippers are economically coerced into signing the exclusive patronage contracts to enable them to get their goods transported in accordance with their requirements. Any shipper not succumbing to this economic pressure and desiring to retain his recognized freedom of choosing any carrier he may see fit to patronize, is penalized by being required to pay an inordinate higher freight rate than that charged the shippers who sign the exclusive contracts, and as a result such a non-signer is often faced with being put out of business. Such higher non-contract rate varies from 10% of the contract rate to a flat $6 a ton on all commodities.

This old-world, non-American set up, which we have challenged for years, now faces its final show down—thanks to our Courts, but with no thanks to the Maritime Authorities—Conference-minded over the years—despite having been charged with protecting all persons—shippers as well as carriers—concerned with the Commerce of the United States.

Since about 1948, the U. S. Departments of Justice, Agriculture, and sometimes Commerce, have opposed the use of the System, as illegal, both before the Maritime Authorities and in the Courts. The National Farm Organizations have now joined in that opposition.

The admitted impact of this U. S. Supreme Court Decision is best evidenced by the statements of those chiefly affected.

Counsel for the Japan-Atlantic and Gulf Freight Conference; one of the Respondents in the Court of Appeals and one of the Petitioners for Certiorari, in its Reply Brief (p. 2; 3), stated that the Decision of the Court of Appeals holds that "as a matter of law, separate and prior approval of the use of a contract/non-contract tariff is required under Section 15 of the Shipping Act, 1916. The day following the filing of the petition for certiorari in this Court, the Supreme Court of Oregon, relying upon the decision of the Court below, ruled that a conference could not sue a shipper for violation of a contract entered into by the shipper in order to avail himself of a contract tariff, since the use of contract/non-contract tariffs by the conference was illegal, it not having been previously and specifically approved by the Board, *Pacific Westbound Conference* v. *Leval & Co.*, decision filed April 21, 1954 (58 Oregon Sup. Ct. Advance Sheets 677). This decision demonstrates that the practical and far-reaching consequences of the decision of the Court of Appeals for the District of Columbia Circuit—consequences which petitioner outlined in its petition * * * that the decision below is of such general importance to the foreign commerce of the United States and to the administration and construction of the Shipping Act, 1916, as to require its review by this Court." The Supreme Court refused review.

In their Petition for Certiorari (No. 703), Counsel for the Federal Maritime Board stated (p. 4) that one of the "fundamental questions" was

> "Whether Section 15 of the Shipping Act, 1916, requires the Board to give prior, separate approval to contract/non-contract rates of common carriers whose conference agreement, approved by the Board, provides for and contemplates the collective fixing of lawful rates."

Some Counsel for the Maritime Authorities have, from time to time, studiously avoided the use of the word "Sys-

tem," in describing this exclusive patronage dual rate set-up and have stealthily substituted the word "tariffs" or "rates"—which attempt at legerdemain has deceived no Court before which the matter has come. As a matter of fact the said Japan-Atlantic and Gulf Freight Conference is attempting to get the system approved before any "rates" or "tariffs", which will be used, have been arrived at.

Board Counsel further stated (pp. 21-22),

> "There are 105 conferences serving this nation's foreign trade whose basic agreements provide for collective rate-making; of these, 62 conferences employ contract/non-contract rates. Only 9 of these 62 have in their organic agreements an express provision for the use of contract/non-contract rates." [We claim the few general words used do not obviate necessity for approval under Section 15, and the case of *Isbrandtsen Co. v. U. S.*, 81 F. Supp. 544—Appeal dismissed 336 U. S. 941, confirms our contention.] "The great majority have no such express provision, and they are in a position similar to the Japan-Atlantic and Gulf Freight Conference. These 53 conferences presently employ contract/non-contract rates, as did the subject conference pre-war, in reliance upon the Board's long-standing construction of Section 15 that prior separate approval was unnecessary. The consequence of *the decision below would* apparently *render unlawful all such rates, for lack of affirmative approval.*" * * * "the use of contract/non-contract rates, by such conferences, being in the opinion of the Court below *an 'agreement' requiring prior approval, would no longer be exempt from the anti-trust laws* with possible concomitant civil and criminal consequences."

At p. 24, Board Counsel further stated that the result of a denial of Certiorari would be that

> "all contract/non-contract rates will rigidly require prior approval—presumably predicated upon full hearing * * * *The requirement of prior approval would also presumably necessitate review of all existing contract*

non-contract rates so as to permit their use only after specific approval."

The Supreme Court did deny Certiorari.

Counsel for the United States Department of Justice, the principal Respondent in the Court of Appeals, stated in its Brief (pp. 2-3), in opposition to Certiorari, that one of the questions presented was

> "Whether an agreement by a conference of water carriers to adopt a dual rate system is an agreement within the meaning of section 15 of the Shipping Act, and is accordingly illegal unless and until approved by the Board as consistent with the criteria set forth in that section."

And again, (pp. 9-10)

> "On January 21, 1954, the Court of Appeals issued its opinion on the merits (R. 248), holding (1) that the Conference agreement to adopt the dual rate system was clearly an agreement (or a modification of an agreement) required to be submitted to the Board under section 15 of the Shipping Act; (2) that, under that section, such agreements are illegal unless and until approved by the Board; (3) that the Board's action permitting the system to take effect in advance of hearing and determination under section 15 was unauthorized."

Another Conference, Pacific Westbound Conference filed a Motion for leave to submit a brief Amicus Curiae in the Supreme Court, in the matter of the Petition for Certiorari, because on April 21, 1954, the Supreme Court of Oregon had rendered a decision in the case of *Pacific Westbound Conference v. Leval & Co., Inc.*, holding that the exclusive patronage contract non-contract dual rate system used by that Conference was "illegal." In that Oregon case the Court said:

> "We are impressed with the reasoning of the United States Court of Appeals for the District of Columbia Circuit in the case of Isbrandtsen Company, Inc., v.

United States of America and Federal Maritime Board, et al. ..... F. 2d ....., (decided January 21, 1954), wherein it is stated:

> "* * * This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se.'"

That Oregon Court stated further,

> "We are of the opinion that there must first be formal approval of this practice as to this particular Conference by the United States Maritime Commission before such an agreement is enforceable between the Conference and a shipper. * * * we view the contract as being 'unlawful' and, therefore, unenforceable before approval by the United States Maritime Commission."

Counsel for the Pacific Westbound Conference, commenting on the Decision of the Court of Appeals for the District of Columbia, argued as follows,

> "The decision in the court below means, not only that this conference has been acting illegally * * * but it also means that the conference and other conferences in foreign trade will have to accept an impracticable procedure for obtaining approvals which will constitute a serious obstacle to carrying on their functions."

So the interpretation of the result of the denial of Certiorari by the Supreme Court of the United States is general—that Conferences now using the exclusive patronage contract/non-contract dual rate system, without having

first obtained specific approval under Section 15, are using the System illegally, in violation of said Section, and are subject to the "penalty" therein provided "of $1,000 for each day such violation continues," and we hereby demand that the Board take immediately such steps as shall be necessary to enforce such penalties, and we shall make similar demands on the Department of Justice to do its part. Like the Government Departments, mentioned above, we have always claimed the System can never *be* approved, because it is illegal.

We further point out that said Conferences, so using the System illegally are subject to proceedings against them under the Anti-Trust Laws, because their "agreements" to use the system are not "lawful under this section" (15) and therefore not "excepted from the provisions of" the Anti-Trust Laws, making such conferences subject to all the proceedings—civil and criminal—penalties and recoveries, provided by the Anti-Trust Laws, without any need of any preliminary or Administrative exhaustion proceeding before this Board. Under the decisions just rendered, this Board has no jurisdiction—"primary" or otherwise—no "expertise" is involved. The Courts have again spoken.

The above decisions, now being the Law of the Land, of which the Board and all Conferences have full notice and knowledge, there exists no further excuse for non-compliance. It therefore becomes the sworn duty of this Board —which function should have been performed before this— to enforce that Law, by calling on all those "62" Conferences to cease and desist from further use of this "illegal" System.

Of the "62" (our count is higher) Conferences using the System, we submit that not *one* has filed for, or received, the specific approval under Section 15 made a prerequisite by said Decisions. (Again as you well know, we also contend the Board has no power to *approve* such a system.) Therefore all Conferences using the System should be embraced

within the directives which should be issued by the Board. Any action less than such a blanket order would constitute participation in unethically requiring a multiplicity of suits, in the face of decided test cases and all embracing decisions.

Without, however, any diminution of our contentions above, we now, for ourselves, at this moment, and without prejudice to any further action, we may see fit to take, hereby make specific demand upon the Board that it immediately direct the particular Conferences named on the attached sheet, to which list we may make additions, from time to time—the member lines of which Conferences compete with us, as a common carrier, or with which we have, or have had dealings as shippers—to cease and desist, and at once, from further use of the System, until, at least, any proper filing they shall make, under Section 15, shall have been approved by the Board.

I shall thank you to advise me promptly of the action you are taking.

Respectfully submitted,

John J. O'Connor
Attorney for Isbrandtsen Company, Inc.

Copies generally.

Far East Conference
Gulf French Atlantic Hamburg Range Freight Conference
Atlantic and Gulf West Coast of South America Conference
East Coast Colombia Conference
Atlantic and Gulf-Straits Settlements, Malay States and Siam Conference
India, Pakistan, Ceylon and Burma Outward Freight Conference
North Atlantic French Atlantic Freight Conference
North Atlantic Mediterranean Freight Conference
Trans-Pacific Freight Conference (Hong Kong)
Association of West Coast Steamship Companies

West Coast of South America Northbound Conference
Associated Steamship Lines (Manila) Conference
New York Freight Bureau (Hong Kong)
Straits/New York Conference
Continental U.S.A. Gulf Westbound Freight Conference
Straits/Pacific Conference

FEDERAL MARITIME BOARD
Washington 25, D. C.

July 16, 1954

John J. O'Connor, Esq.
Washington Building
Washington 5, D. C.

Re: Steamship Conferences in foreign trade, illegally using the Exclusive Patronage Contract/non-Contract Dual Rate System, without having first obtained approval under Section 15 of the Shipping Act, 1916.

Dear Sir:

This serves to acknowledge receipt of your letter of July 1, 1954, which letter is receiving serious and considerate study by the Board. Our studies of the problem have not been concluded and, at this writing, we are not prepared to state what course of action will be taken by the Board. Furthermore, there are proceedings now pending before the Board which involve contract/non-contract rates and it may be inappropriate at this time to take a position which might have the effect of pre-judging these matters. In all events, we hope to have an answer to your letter at an early date.

Sincerely yours,

/s/ Louis S. Rothschild
Louis S. Rothschild
Chairman

[Nothing further was ever heard from the Board.]

APPENDIX C

THE EXCLUSIVE-PATRONAGE SYSTEM IS INTENDED TO ELIMINATE AND DOES ELIMINATE COMPETITION.

The Board has on various occasions frankly admitted the unmitigated purpose and inevitable result of the exclusive-patronage system.

The counsel for the Board made the following statement to the District Court in *Isbrandtsen Company v. United States*, 96 F. Supp. 883 (S.D.N.Y. 1951):

> "'That the purpose of the dual-rate provisions was, if possible, to bring about a condition in which an independent carrier [such as Isbrandtsen] would be compelled (through loss or threatened loss of profits) either to join the conference *or go out of business.*'
> "... [I]f a contract system is wholly effective it will *result in a complete monopoly* .... Necessarily, in these circumstances, there would be no service by independent operators."

Similarly, the Board's chairman, in his dissenting opinion in *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (December 19, 1955, served on March 5, 1956), made the following comments:

> "In considering an application to institute a dual rate system *in any trade, we must recognize the immediate purpose of the system, simply stated, to be the elimination of non-conference competition, as such,*
>
> * * * *
>
> ..." (Mimeographed Report, page 33.)
>
> "To test the validity of a dual rate system by its effect on independent operators is to permit the tail to wag the dog. ... The non-conference operator's handicaps in the face of a dual rate system, ... are self assumed." (Mimeographed Report, page 34.)